Supreme Court, U.S.
FILED

961962 JUN 9 1997

No. ___ OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 1996

Sylvia Cohen,

Petitioner,

vs.

Little Six, Inc., d/b/a Mystic Lake Casino,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

GREGORY ANDREW ABBOTT
Counsel of Record
ABBOTT AND BARUCH, LTD.
431 South Seventh Street, Suite 2424
Minneapolis, Minnesota 55415
(612) 333-9158

CLINTON COLLINS, JR.
CLINTON COLLINS &
ASSOCIATES, P.A.
821 Marquette Avenue, Suite 2500F
Minneapolis, MN 55402
(612) 373-0991

Attorneys for Petitioner

1997 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

149 pp

QUESTIONS PRESENTED:

1. Does *Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097 (1995), limit or overrule *Morton v. Mancari,* 417 U.S. 535 (1974), by requiring a strict level of scrutiny for statutory schemes benefiting Indian tribes and/or tribal businesses as racially distinct groups?

2. Is operation of a for-profit gambling casino a "governmental" purpose which entitles a corporation chartered by an Indian tribe to assert sovereign immunity as a defense to tort claims arising from the casino's normal business operations?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement of The Case 3

ARGUMENT: Why The Writ Should Be Granted 8

I. CONFLICT BETWEEN *ADARAND* AND *MANCARI* REGARDING THE APPROPRIATE LEVEL OF SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE SHOULD BE RESOLVED. 8

A. EVEN BEFORE *ADARAND*, *MANCARI'S* TREATMENT OF INDIAN TRIBES AS POLITICAL, NOT RACIAL, ENTITIES WAS GREATLY WEAKENED. 9

B. *ADARAND* CONTRADICTS OR LIMITS *MANCARI* 13

C. THE CONFLICT BETWEEN *ADARAND* AND *MANCARI* SHOULD BE RESOLVED 16

1. Heightened Scrutiny Will Protect Indian Tribes From Racially-Motivated Congressional Actions Which Are Detrimental, Not Beneficial 17

2. Heightened Scrutiny Will Limit Unjust Application of Tribal Sovereign Immunity on the Basis of Race 19

3. Heightened Scrutiny Prevents Judicial Application of Sovereign Immunity on the Basis of Race. 21

II. CONFLICT BETWEEN STATE COURTS OF LAST RESORT ON IMPORTANT QUESTIONS OF FEDERAL LAW SHOULD BE RESOLVED. 23

III. IMPORTANT SIMILAR ISSUES ARE PENDING BEFORE THIS COURT 24

IV. CONCLUSION 24

Appendix

Order Denying Petition for Rehearing A-1

Order Affirming Court of Appeals A-2

Minnesota Court of Appeals Opinion A-3

Minnesota Supreme Court Opinion, ... A-78
Gavle v. Little Six, Inc., 555 N.W.2d 284
(Minn. 1996), *petition for cert. pending*
(No. 96-1215, docketed January 30, 1997)

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES:

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) ..... i, 4, 8, 9, 13-15, 17, 19, 20-21

Brown v. Board of Education, 347 U.S. 483 (1954) 11

Bryan v. Itasca County, 426 U.S. 373 (1976) 7

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 17, 18

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 17

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) 12

Korematsu v. United States, 323 U.S. 214 (1944) 11

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 17

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 15

Morton v. Mancari, 417 U.S. 535 (1974) ..... i, 5, 8-18

Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505 (1991) 20

Plessy v. Ferguson, 163 U.S. 537 (1896) 11-12

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 11

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 15, 16

Rice v. Rehner, 463 U.S. 713 (1983) 19

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 19

Shelley v. Kraemer, 334 U.S. 1 (1948) 4, 5, 21-22

United States v. Antelope, 430 U.S. 641 (1977) 13, 18

United States v. John, 437 U.S. 634 (1978) 12-13

United States v. Kagama, 118 U.S. 375 (1886) 17

United States v. Wheeler, 435 U.S. 313 (1978) 19

Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) .. 13, 15, 18

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 18

U.S. COURTS OF APPEAL CASES:

American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) 20

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied sub nom. Lee, Warden v. Pero et al.*, 306 U.S. 643 (1939).....13

In Re Greene, 980 F.2d 590 (9th Cir. 1992).....23

United States v. Ives, 504 F.2d 935 (9th Cir. 1974).....13

STATE COURT CASES:

Cohen v. Little Six, Inc., 543 N.W.2d 376 (Minn. App. 1996).....1, 4-5, 7, 11-12, 17, 20

Dixon v. Picopa Construction Co., 160 Ariz. 251, 772 P.2d 1104 (1989).....23

Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996), *petition for cert. pending*, (No. 96-1215, Jan. 30, 1997).....1, 6, 7, 18, 19-20, 23-24

North Sea Products, Ltd. v. Clipper Seafoods Co. 92 Wash.2d 236, 595 P.2d 938 (1979).....23

Padilla v. Pueblo of Acoma, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989).....23

Setchell v. Little Six, Inc., No. 96-8834, docketed April 30, 1997.....24

CONSTITUTION AND STATUTES:

U.S. CONSTITUTION, AMENDMENT V:.....2

U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1:.....2

18 U.S.C. §§ 1152-53.....13

25 U.S.C. § 479.....11

25 U.S.C. § 2601 *et seq*.....11, 15

25 U.S.C. § 2651(4)(A-E).....11

28 U.S.C. § 1257(a).....1

28 U.S.C. § 1360(a).....4, 7

RULES:

Rule 12, Minn. R. Civ. P.....4

OTHER AUTHORITIES:

Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians,* 106 YALE L.J. 537 (1996).....9-10, 13, 15

Robert N. Clinton, Nell J. Newton, & Monroe E. Price, AMERICAN INDIAN LAW: CASES AND MATERIALS (3rd ed., 1991).....18

Rennard Strickland, *Genocide-at-Law: An Historical and Contemporary View of the Native American Experience,* 34 U. KAN. L.REV. 713 (1986).....18

David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991)..... 10-13, 15-16, 18

Sylvia Cohen petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this case on January 21, 1997 (petition for rehearing denied, March 11, 1997).

OPINIONS BELOW

The Minnesota Supreme Court's order summarily affirming the Minnesota Court of Appeals is unreported and is included herein. Appendix ("App.") at A-2. The Minnesota Supreme Court's order denying the petition for rehearing is unreported and included herein. App. at A-1.

The order issued by the Minnesota Supreme Court was explicitly based on its prior decision in *Gavle v. Little Six, Inc.*, reported at 555 N.W.2d 284 (Minn. 1996), *petition for cert. pending,* (No. 96-1215, Jan. 30, 1997). *Gavle* is included herein. App. at A-78 to A-114.

The decision of the Minnesota Court of Appeals is reported as *Cohen v. Little Six, Inc., d/b/a Mystic Lake Casino,* 543 N.W.2d 376 (Minn. App. 1996), and is included herein. App. at A-3 to A-77.

JURISDICTION

The Minnesota Supreme Court's order affirming the Minnesota Court of Appeals was entered on January 21, 1997. The Minnesota Supreme Court denied the petition for rehearing on March 11, 1997.

Jurisdiction in the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a), on grounds that

Petitioner seeks review of a judgment by the highest State court in which a decision could be had, a judgment which rejected claims of rights, privileges, and immunities under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED:

U.S. CONSTITUTION, AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service of time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On October 7th, 1994, Petitioner Sylvia Cohen, then 83 years old, accompanied a friend to Mystic Lake Casino in Prior Lake, Minnesota. As they were leaving for the day, Mrs. Cohen's companion went to a pay phone near the casino's main entrance to make a call. Because there was no place to sit near the pay phone while she waited for her companion, Mrs. Cohen attempted to sit in a chair facing a slot machine nearby. While Mrs. Cohen was attempting to sit down, without warning the chair beneath her "snapped back" to its original position. As a result Mrs. Cohen fell to the ground, breaking her hip. Mrs. Cohen suffered, and continues to suffer, severe, permanent and disabling injuries as a consequence of her fall.

Mystic Lake Casino is located on the reservation of the Shakopee Mdewakanton Sioux Community ("the Community"), and is owned and operated by Little Six, Inc. ("Little Six"). Little Six is a for-profit corporation formed by the Community for the purpose of conducting gaming operations. Little Six's corporate charter, granted by the Community, purports to grant Indian tribal sovereign immunity to Little Six to the same extent as the Community itself possesses sovereign immunity.

B. LEGAL PROCEEDINGS

Mrs. Cohen commenced a state court personal injury action on February 7, 1995, in Scott County, Minnesota, where Mystic Lake Casino is located. Little Six made a motion to dismiss Mrs. Cohen's suit for want of jurisdiction

pursuant to Rule 12, Minn. R. Civ. P., asserting the grant of Indian tribal sovereign immunity to Little Six made it immune to suit. Mrs. Cohen opposed Little Six's Rule 12 motion, arguing in part that application of sovereign immunity violated her rights under the Due Process Clause of the Constitution of the United States. *See* Plaintiff's Response to Defendant's Motion to Dismiss, at 8.

A hearing was held on March 29, 1995, and the trial court granted Little Six's Rule 12 motion on March 31, 1995. Trial Court Order and Judgment, March 31, 1995, at 1-2. In granting the motion to dismiss, the trial court expressly rejected Mrs. Cohen's federal due process claims. Trial Court Memorandum of Law, March 31, 1995, at 9-10.

After the Minnesota district court dismissed Petitioner's claims, but before the decision of the Minnesota Court of Appeals, this Court held that all government programs utilizing racial or ethnic classifications are subject to strict scrutiny in *Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097 (1995).

Mrs. Cohen appealed to the Minnesota Court of Appeals, again contending that dismissal of her action violated the Due Process Clauses of the U.S. Constitution, and that Minnesota state courts possessed jurisdiction over her civil claim pursuant to Public Law 280, 28 U.S.C. § 1360(a). *See* Appellant's Brief and Appendix, at 14-17. In particular Mrs. Cohen argued that judicial enforcement of tribal sovereign immunity would violate this Court's decision in *Shelley v. Kraemer,* 334 U.S. 1 (1948). *Id.,* at 16-17.

Over a vigorous and lengthy dissent, the Minnesota Court of Appeals affirmed dismissal of Mrs. Cohen's action for lack of subject matter jurisdiction. *Cohen v. Little Six, Inc.,* 543

N.W.2d 376, 380-81 (Minn. App. 1996); App. at A-10 to A-12. The majority opinion explicitly based its decision on federal law. *Id.,* at A-10 to A-13. The dissenting opinion raised the issue of racial discrimination and tribal sovereign immunity, *Id.,* App. at A-57 to A-63 (Randall, J., dissenting), and in addressing issues raised by Mrs. Cohen, specifically rejected this Court's decision and reasoning in *Morton v. Mancari,* 417 U.S. 535, 553 (1974). *Id.,* at A-62 to A-63 (Randall, J., dissenting).

Mrs. Cohen then sought review of this decision in the Minnesota Supreme Court. In her Petition for Review filed March 12, 1996, Mrs. Cohen raised the following pertinent issues: (1) whether tribal sovereign immunity amounted to unconstitutional racial discrimination; (2) whether requiring claims to be filed in deficient tribal courts violates constitutional due process; (3) whether judicial enforcement of racially discriminatory tribal clauses in tribal business charters violates *Shelley, supra*; and (4) whether a tribal corporation is entitled to assert the defense of sovereign immunity. *See* Petition for Review to Minnesota Supreme Court, at 1-2.

Little Six filed a motion to strike the federal constitutional issues raised by Mrs. Cohen, asserting they had not been raised below. *See* Motion to Strike, at 1-3. Mrs. Cohen's Response to the Motion argued: 1) that the issues had, in fact, been raised in the courts below; 2) review of a dismissal for lack of subject matter jurisdiction is *de novo,* entitling Mrs. Cohen to raise new legal issues on appeal; and 3) the broad grant of appellate jurisdiction to the Minnesota Supreme Court and Court of Appeals, pursuant to Rule 103.04, Minnesota Rules of Civil Appellate Procedure,

allowed consideration of Mrs. Cohen's federal constitutional claims. *See* Response to Motion to Strike, at 2-6.

In its order of April 16, 1996, the Minnesota Supreme Court denied Respondent's Motion to Strike and granted review of Mrs. Cohen's appeal without qualifying or limiting any issue raised by her. *See* Order granting review, April 16, 1996.

The Minnesota Supreme Court stayed all proceedings until its final disposition of *Gavle v. Little Six, Inc., d/b/a Mystic Lake Casino,* 555 N.W.2d 284 (Minn. 1996), *petition for cert. pending* (No. 96-1215, docketed January 30, 1997), which was then pending. Order granting review, April 16, 1996.

The Minnesota Supreme Court decided *Gavle* on October 31, 1996, and therein rejected challenges to the application of Indian tribal sovereign immunity. Federal law was the explicit basis for this decision. *Gavle,* 555 N.W. 2d, at 296; App. A-102 (upholding claim of immunity "in the absence of some change in Congressional policy or direction from the U.S. Supreme Court").

On January 21, 1997, the Minnesota Supreme Court summarily affirmed the Court of Appeals, upholding dismissal of Mrs. Cohen's claims on grounds that *Gavle* was controlling. App. at A-2.

Three particular issues decided by the Minnesota Supreme Court in *Gavle* were dispositive of issues raised by Mrs. Cohen. The relevant holdings were: (1) Minnesota courts had jurisdiction to hear civil claims against Indian businesses entities where the claims arose both within and

outside the reservation[1]; and (2) Minnesota courts could consider whether a tribal business entity was entitled to assert sovereign immunity without infringing on tribal self-government; and (3) Little Six was entitled to assert the Community's sovereign immunity as a defense. *Gavle,* 555 N.W.2d, at 290-91, App. at A-88 (jurisdiction); at 292, App. at A-92 (state court consideration of sovereign immunity); at 296, App. at A-102 (use of sovereign immunity by tribal business).

On January 31, 1997, Mrs. Cohen filed a petition for rehearing, contending that the Minnesota Supreme Court had not properly resolved Mrs. Cohen's federal constitutional issues because *Gavle* did not explicitly address these issues,

---

[1] By concluding that Minnesota courts had jurisdiction, the Minnesota Supreme Court in *Gavle* overruled the lower court's holding that Mrs. Cohen's claims should be dismissed for lack of subject matter jurisdiction. *See* Court of Appeals opinion, supra, 543 N.W.2d, at 380-81; App. at A-10 to A-12 (affirming dismissal for want of jurisdiction). However, unlike *Gavle,* Mrs. Cohen's tort claim arose entirely within the boundaries of the reservation. *Cf.* section A, *supra, with Gavle,* 555 N.W.2d, at 290, App. at A-86 to A-87.

State court jurisdiction is not affected by this fact difference. Public Law 280 extends Minnesota state court civil jurisdiction to the Community's reservation. 28 U.S.C. § 1360(a). Civil tort actions are specifically included in this grant of jurisdiction. *See Bryan v. Itasca County,* 426 U.S. 373, 383-84 n.10 (1976) (citing with approval scholars' conclusion that civil jurisdiction under P.L. 280 included "the laws of contract, **tort,** marriage, divorce, insanity, descent, etc.") (emphasis added).

Having prevailed in the courts below on subject matter jurisdiction, Petitioner does not raise the issue in her Petition for Writ of Certiorari. However, should the issue of subject matter jurisdiction arise again, Petitioner reserves the right to assert that constitutional due process is violated by granting exclusive or primary jurisdiction to tribal courts lacking judicial independence and adequate procedures. *See, e.g., Cohen,* 543 N.W.2d, at 392-97, App. at A-40 to A-51 (Randall, J., dissenting) (describing substantial deficiencies in tribal courts).

and as result *Gavle* was not controlling. *See* Petition for Rehearing, at 1-3. The Minnesota Supreme Court denied Mrs. Cohen's Petition for Rehearing, without comment, on March 11, 1997. App. at A-1. Significantly the Minnesota Supreme Court never dismissed any part of Mrs. Cohen's Petition for Review for want of jurisdiction or as improvidently granted, nor did it provide any basis for its judgment other than its decision in *Gavle*.

ARGUMENT:
Why the Writ Should be Granted

The strict scrutiny now required by *Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097 (1995), for all government programs benefiting racial or ethnic minorities conflicts with the legal basis for the Federal Government's plenary power to regulate Indian affairs.

The courts below failed to recognize this fundamental conflict, and have thus erred by rejecting Petitioner's constitutional claims.

This Court should grant Petitioner's Writ to resolve the conflict posed by *Adarand,* and to decide other important questions of constitutional law.

I. CONFLICT BETWEEN *ADARAND* AND *MANCARI* REGARDING THE APPROPRIATE LEVEL OF SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE SHOULD BE RESOLVED.

Since *Adarand* all federal benefits based on racial or ethnic criteria are subject to strict scrutiny -- all benefits, that

is, **except** those provided to Indians, the sole remaining group whose federal benefits are analyzed under a rational basis test, pursuant to *Morton v. Mancari,* 417 U.S. 535, 553-54 (1974).

Mancari and *Adarand* are on a collision course, a collision avoidable only if this Court revisits the question of the equal protection principles applicable to Congressional benefits provided to Indians and Indian tribes.

A. EVEN BEFORE *ADARAND*, *MANCARI'S* TREATMENT OF INDIAN TRIBES AS POLITICAL, NOT RACIAL, ENTITIES WAS GREATLY WEAKENED.

Mancari's use of a separate, rational-basis level of scrutiny for Indians and/or Indian tribes had become problematic even before *Adarand.*

In *Mancari* this Court upheld rational-basis level of scrutiny for government programs benefiting members of Indian tribes, on grounds that Indian tribes were "political" and not racial in nature. *Id.,* at 553 n.24. *Mancari* justified this conclusion by reasoning that Indian tribal members received benefits from the contested program because their association with the tribe was based on political, not racial characteristics. *Id.* "The distinction between tribal and racial distinctions thus served as the linchpin of the entire decision. As long as the Court could characterize the benefits to Indian tribes as existing on a government-to-government basis, it could distinguish such a scheme from suspect classifications that are subject to strict scrutiny." Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native*

Hawaiians, 106 YALE L.J. 537, 547 (1996) (discussing *Mancari*).

Mancari has since been undermined by its own defective logic. *Mancari* used the "political" status of tribal Indians versus non-tribal Indians as a non-suspect category justifying rational basis review. However, this distinction simply begs the racial question by pushing racial analysis onto the tribe. As a result *Mancari* compares apples to oranges: the federal statute at issue benefited tribal Indians at the expense of **non-Indians**. Race, not political status, was the decisive criteria which separated the winners from the losers: no non-Indian could ever hope to receive the benefits in question. Racial classifications are not magically transformed simply because racially-neutral criteria are used to select a sub-set of the racial category. As one commentator notes:

> As long as federal definitions of "Indian" include a blood requirement, they facially involve a suspect characteristic; if they combine it with a political affiliation requirement, the resultant class is facially drawn on the basis of one suspect and one nonsuspect characteristic. . . . True, the category does not include all members of a particular racial group, but then neither did the categories "black schoolchildren" in *Brown*, or "Japanese-American residents of the West Coast" in *Korematsu v. United States,* or "nonminority applicants to medical school" in *Bakke.*

David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 807

(1991) (citing *Brown v. Board of Education,* 347 U.S. 483 (1954); *Korematsu v. United States,* 323 U.S. 214 (1944); and *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978)) (footnotes omitted).

There is virtually no support for *Mancari's* non-racial definition of tribal Indians. Under federal law, Indian tribes and their members are defined primarily on the basis of their racial and/or ethnic background. *See, e.g.,* 25 U.S.C. § 479; 25 U.S.C. § 2651(4)(A-E) (explicitly extending special benefits to Indians who do not belong to Indian tribes, defining "Indian" in racial terms) (benefits extended by 25 U.S.C. § 2601 *et seq.*). "[V]irtually all of the federal definitions of 'Indian' contain, to the naked eye, a substantial genetic and therefore racial component." D. Williams, *supra,* 38 UCLA L. REV., at 796.

Rational-basis scrutiny of federal programs targeted at Indians and Indian affairs ignores fundamental questions of racial equity. Judge R.A. Randall, dissenting below in the Minnesota Court of Appeals, wrote:

> To me, this is red apartheid. I believe the entire issue of "sovereignty" rests on true red apartheid. The American Indian will never be fully integrated into this state, nor into this country, until we recognize this "dual citizenship" for what really is, a pancake makeup coverup of *Plessy* which allowed separate but equal treatment. *See Plessy,* 163 U.S. at 551 (holding that "equal but separate accommodations for the white and colored races" for railroad passengers was constitutional).

> No further cite, other than this reference to *Plessy* is needed. I can only note, "Haven't we learned anything?"

Cohen, supra, 543 N.W.2d, at 395; App. at A-45 (Randall, J., dissenting) (citing *Plessy v. Ferguson,* 163 U.S. 537 (1896)).

Pretending to ignore race issues in a discussion of Indian tribal status is a dangerous fiction. A scholarly critic of *Mancari* has written:

> Indian law really is an aberration in American law: a legally condoned system that treats individuals differently -- at least in some cases and to some extent -- because of their race. And believers in expansive tribal sovereignty should not try to avoid a blunt recognition of this truth.

D. Williams, *supra,* 38 UCLA L. REV., at 762.

Furthermore this Court's post-*Mancari* opinions have generally ignored the distinction between tribal and non-tribal Indians, substantially weakening the authority of their citations to *Mancari*. For example, in *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73 (1977), this Court upheld a statute awarding benefits to certain recognized tribes, even though non-members of one tribe were eligible to receive the benefits. *Id.,* at 82 n.14. Both Justice Blackmun, in his concurring opinion, and Justice Stevens, in dissent, criticized the Court's opinion for relying on *Mancari* when non-tribal, non-"political" Indians received benefits. *Id.,* at 90 (Blackmun, J., concurring in part and in the result); at 94 (Stevens, J., dissenting). And in *United States v. John,* 437 U.S. 634 (1978), the Court held that the Indian

Reorganization Act ("IRA") applied to a tribe not federally recognized when the IRA was adopted, holding that the IRA defined "Indians" in racial terms. *Id.*, at 649-50. And in several cases equal protection challenges by individual Indians have been rejected on the basis of *Mancari*. *See, e.g., Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 499-500, and n.46 (1979); *United States v. Antelope,* 430 U.S. 641, 646-49 (1977); *see also* D. Williams, *supra,* 38 UCLA L.REV., at 790-91, and n.117. The Indian Major Crimes Act, 18 U.S.C. §§ 1152-53, has been applied to Indians statutorily defined by their racial, not tribal, affiliation. *See United States v. Ives,* 504 F.2d 935, 953 (9th Cir. 1974); *Ex parte Pero,* 99 F.2d 28, 30 (7th Cir. 1938), *cert. denied sub nom. Lee, Warden v. Pero et al.,* 306 U.S. 643 (1939).

Thus even before *Adarand, Mancari* had become an empty shell, a reflexive citation without substantive content. To quote Gertrude Stein, "[t]here's no there there."

B. *ADARAND* CONTRADICTS OR LIMITS *MANCARI*

Mancari was decided before *Adarand* established a general rule for the level of scrutiny to review governmental actions benefiting racial minorities. As a consequence *Mancari's* use of a separate level of scrutiny for a racially distinct minority did not necessarily conflict with other constitutional principles at the time. *See generally* S.M. Benjamin, *supra,* 106 YALE L.J. at 567.

Today, after *Adarand, Mancari* now conflicts with established constitutional principles. In *Adarand,* this Court

held that "**all** racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. *Adarand,* 115 S.Ct. at 2113 (emphasis supplied). *Adarand* categorically rejects the notion of "group rights":

> [T]he basic principle [is] that the Fifth and Fourteenth Amendments protect *persons*, not *groups*. It follows from that principle that all governmental action based on race -- a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," . . . -- should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them.

Id., at 2112-13 (citations omitted) (emphasis in original).

Adarand contradicts *Mancari* in the most fundamental way. This Court's unequivocal rejection of "group rights" and "benign" racial classifications is substantially at odds with *Mancari:* the political/tribal distinction drawn in *Mancari* is nothing more than creation of a "benign" category in which "group rights" are defined by particular racial characteristics.

Adarand's broad holding also applies directly to the Federal Government's independent constitutional authority to regulate Indian affairs. Justice Stevens, dissenting in

Adarand, strongly implied that because the Court's holding limited the power granted to Congress under §5 of the Fourteenth Amendment, that it also would limit Congress' power to regulate Indian affairs:

> [In *Mancari*] [w]e concluded that the classification was not "racial" because it did not encompass all Native Americans. 417 U.S., at 553-554. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. *Id.,* at 551-52. In this case the Government relies, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by §5 of the 14th Amendment.

Id., at 2121 n.3 (Stevens, J., dissenting). *But see Adarand,* at 2114 (majority opinion expressly reserves question of extent of Congressional power under §5 of the Fourteenth Amendment). *See also* S.M. Benjamin, *supra,* 106 YALE L.J. at 548 n.44 ("It is possible, especially in light of *Croson, Metro Broadcasting,* and *Adarand* (all of which were decided after *Yakima Nation*) that, if the issue arises again, the Court will conclude that even political classifications based on tribal membership are subject to strict scrutiny.") (citing *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990), and *Yakima Nation, supra*).

Adarand also directly limited or overruled *Mancari sub silentio* by striking down a federal program specifically benefiting Indians. *Adarand,* 115 S.Ct. at 2103 (under 13

C.F.R. § 105(b)(1), protected groups include "socially and economically disadvantaged" "Black Americans, Hispanic Americans, **Native Americans,** Asian Pacific Americans, and other minorities") (emphasis added). *See also Croson, supra,* 488 U.S., at 478, 494 (strict scrutiny applies to state and local programs favoring, among others, "Indians").

Lastly *Adarand* contradicts *Mancari* by implicitly rejecting the idea that benefits conferred on the basis of race can compensate for past discrimination. *See Adarand,* 115 S.Ct., at 2118-19 (Scalia, J., concurring). Congressional actions which benefit Indians are clearly aimed at remedying past harm suffered by an identifiable racial minority. *See, e.g.,* 25 U.S.C. § 2601 (establishing policy to meet "special educational and culturally related academic needs of Indian students in the United States . . ."). Attempts to remedy past harms by providing benefits to Indian tribes cannot be squared with this Court's "liberal individualist jurisprudence." D. Williams, *supra,* 38 UCLA L. REV., at 818.

C. THE CONFLICT BETWEEN *ADARAND* AND *MANCARI* SHOULD BE RESOLVED.

The conflict between *Adarand* and *Mancari* calls into question the extent to which other provisions of the Constitution limit the plenary power of the Federal Government to regulate Indian affairs. Without a doubt this is a question of vital national importance which deserves resolution by this Court.

Resolution of this conflict has three particular benefits: (1) limitation on Congressional actions which are detrimental, not beneficial, to Indian tribes; (2) correction of injustice

resulting from indiscriminate extension and use of tribal sovereign immunity; and (3) limitation of judicial actions which enforce private discrimination on the basis of race.

1. Heightened Scrutiny Will Protect Indian Tribes From Racially-Motivated Congressional Actions Which Are Detrimental, Not Beneficial.

Judicial review of Congressional actions under a rational basis level of scrutiny is far too feeble to protect Indians and Indian tribes from adverse governmental action. The long and troubled history of Congressional treatment of Indians and Indian tribes, unchecked by effective judicial review, illustrates the point.

It is well-settled that Congress has plenary power to regulate all matters in Indian country, despite "some confusion" as to the sources of Congressional power. *See, e.g., McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 n. 7 (1973); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 18 (1831); *United States v. Kagama,* 118 U.S. 375, 378-79 (1886); *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is provide Congress with plenary power to legislate in all fields of Indian affairs.") (citing *Mancari*).

Power corrupts, and plenary power corrupts absolutely. Congress has not hesitated in the past to invalidate treaties, relocate Indian tribes, suppress Indian culture and history, take Indian land for the economic benefit of other (white) citizens, and imprison or kill Indians attempting to resist these actions. *See Cohen,* 543 N.W.2d, at 387-88, App. at A-27 to

A-28 (Randall, J., dissenting) (list of broken treaties, massacres, and forced relocations); Robert N. Clinton, Nell J. Newton, & Monroe E. Price, AMERICAN INDIAN LAW: CASES AND MATERIALS, at 8 (3rd ed., 1991) ("[T]he history of contact between Indians and Euro-Americans best can be described as a struggle for human survival by Indians against genocidal extermination.") (citing Rennard Strickland, *Genocide-at-Law: An Historical and Contemporary View of the Native American Experience,* 34 U. KAN. L.REV. 713 (1986)).

As horrific as these actions were, many of them might have survived rational basis scrutiny. The judicial history of the United States provides little hope that a rational basis test will protect Indians from adverse Congressional action. *See, e.g., Cherokee Nation, supra; Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *see also* Clinton, Newton & Price, *supra,* at 8.

Should *Mancari's* rational basis scrutiny remain in place, no formal constitutional barrier prevents Congress from again discriminating against Indians. Worth noting in this context is the fact that *Mancari* has been cited by this Court to justify application of rational basis scrutiny in cases where Congressional action has harmed Indians and Indian tribes. *See, e.g., Yakima Nation, supra; Antelope, supra;* D. Williams, *supra,* 38 UCLA L.REV., at 790-91 n.117. *Mancari* has been applied in this manner despite careful efforts by the author of *Mancari,* Justice Blackmun, to limit its use to cases where government programs benefited Indians. *Mancari,* 417 U.S., at 555 (rational-basis test applied to programs which "further Indian self-government").

Resolution of the conflict between *Adarand* and *Mancari* will allow courts to examine future legislation which harms Indians and Indian tribes under greater scrutiny, reducing the

chances that racial animus can successfully be hidden behind ostensibly neutral governmental purposes.

2. Heightened Scrutiny Will Limit Unjust Application of Tribal Sovereign Immunity on the Basis of Race.

Tribal sovereign immunity is possessed by a distinct political entity, whose membership is entirely determined on the basis of race or ethnicity. A strict level of scrutiny would require tribal sovereign immunity be examined to see if it is narrowly tailored to meet a compelling governmental interest. Arbitrary and unjust applications of tribal sovereign immunity would not survive such examination.

Tribal sovereign immunity exists by virtue of Congressional action, and is completely subordinate to the plenary power of Congress. *Pice v. Rehner,* 463 U.S. 713, 719 (1983); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *United States v. Wheeler,* 435 U.S. 313, 323 (1978). Congress, in the exercise of its plenary power, has established a statutory scheme permitting Indian tribes, and no other group, to assert sovereign immunity as a defense in all civil cases.

Strict scrutiny would call into question the current broad scope of tribal sovereign immunity. Furthermore, even if tribal sovereign immunity *per se* would survive strict scrutiny, the extension of sovereign immunity to tribal businesses under these facts would not. Extension of tribal sovereign immunity to successful, multi-million dollar gambling establishments is hardly "narrowly tailored" to meet a "compelling governmental interest." *See Gavle,* 555 N.W.2d,

at 298, App. at A-106 to A-107 (Keith, C.J., dissenting) (Little Six is a "for-profit, multi-million dollar" business "with "hundreds of employees"), *Cohen,* 543 N.W.2d, at 402, App. at A-64 (Randall, J., dissenting) ("To call Mystic Lake, the largest casino in Minnesota and one in size that compares favorably with large casinos in Las Vegas and Atlantic City, a "tribal enterprise" is like calling the Mall of America in Bloomington 'a smallish Bloomington strip mall.'").

Indeed, even if this Court applied a lesser level of scrutiny, a statutory scheme permitting indiscriminate use of tribal sovereign immunity in a commercial context would still violate equal protection principles. The huge economic success of Mystic Lake Casino benefits a tribe of less than 200 members. *Cohen,* 543 N.W.2d, at 402, App. at A-64 (Randall, J., dissenting). This stands in stark contrast to the traditional defense of tribal sovereign immunity, *i.e.,* protection of tribes' limited economic resources. *See, e.g., Gavle,* 555 N.W.2d, at 295, App. at A-98 ("It is in such [commercial] enterprises and transactions that the Indian tribes and the Indians need protection.") (citation omitted); *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir. 1985) ("[I]mmunity is thought necessary to promote the federal policies of tribal selfdetermination [*sic*], economic development, and cultural autonomy.") (citations omitted).

Tribal sovereign immunity is "an anachronistic fiction," *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe,* 498 U.S. 505, 514 (1991) (Stevens, J., concurring), which provides substantial benefits to members of a racially distinct minority. As such, it should be examined under heightened scrutiny in light of *Adarand.*

Injured at an immensely profitable commercial establishment, Petitioner is prevented from obtaining a remedy by extension of tribal sovereign immunity to Little Six. Resolution of the conflict between *Mancari* and *Adarand* would serve to correct this injustice for thousands of Americans who visit tribal casinos every day.

3. Heightened Scrutiny Prevents Judicial Application of Sovereign Immunity on the Basis of Race.

Judicial recognition of sovereign immunity for Little Six amounts to state action discriminating on the basis of race, in violation of *Shelley v. Kraemer,* 334 U.S. 1 (1948).

For tribal sovereign immunity to be effective, state and federal courts must recognize and apply it against plaintiffs suing tribes or tribal businesses. Judicial recognition of tribal sovereign immunity constitutes state action enforcing such immunity for the benefit of tribes or tribal businesses. Because tribal sovereign immunity may only be asserted by groups with a particular racial make-up, judicial enforcement of tribal sovereign immunity amounts to state action which discriminates on the basis of race.

Shelley holds unconstitutional judicial action which enforces racially discriminatory private acts. *Id.*, at 14, 20-21. The language of the opinion applies well to the present case:

> The Constitution confers upon no individual the right to demand action by the State which results in denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State

> to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.

Id., at 22 (citation omitted). By asserting tribal sovereign immunity against Petitioner, Little Six successfully demanded that Minnesota state courts provide it a legal benefit categorically unavailable to members of other racial groups. Judicial enforcement of this immunity amounts to state action in violation of the Fourteenth Amendment.

Judicial enforcement of specific provisions of Little Six's corporate charter also constitutes racially discriminatory state action, even if enforcement of tribal sovereign immunity generally would not. Little Six's corporate charter discriminates regarding race in authorizing use of tribal sovereign immunity as a legal defense, by providing that sovereign immunity may only be asserted against non-members of the Community. *See* Article of Incorporation, Appellant's Brief and Appendix before Minnesota Court of Appeals, at F-8 to F-9, Articles 3.2 and 4.0. Under federal law, membership in the Community is based on racial characteristics. *See* section I.A., *supra.*

Whether race is a factor generally or as applied in particular cases, judicial action extending benefits only to those in a certain racial group raises profound questions of constitutional law under the Fifth and Fourteenth Amendments. As such, these questions deserves resolution by this Court.

II. CONFLICT BETWEEN STATE COURTS OF LAST RESORT ON IMPORTANT QUESTIONS OF FEDERAL LAW SHOULD BE RESOLVED.

This Court has never addressed the question of the extent of tribal sovereign immunity in commercial ventures. *In Re Greene,* 980 F.2d 590, 600-01 n.1 (9th Cir. 1992) (Rymer, J., concurring).

Lacking guidance from this Court on this issue, state supreme courts are badly split. The Minnesota Supreme Court, in *Gavle,* recognized no limit to tribal sovereign immunity on the basis of commercial activity. *Gavle, supra,* 555 N.W.2d, at 294-97, App. at A-97 to A-100. Nor did the Washington Supreme Court in *North Sea Products, Ltd. v. Clipper Seafoods Co.,* 92 Wash.2d 236, 595 P.2d 938, 939, 942-43 (1979). However, the Arizona Supreme Court has held tribal sovereign applicable only to "tribal business," and not applicable to "non-tribal business." *Dixon v. Picopa Construction Co.,* 160 Ariz. 251, 772 P.2d 1104, 1109 (1989); and the New Mexico Supreme Court rejected the sovereign immunity defense for commercial, off-reservation activities in *Padilla v. Pueblo of Acoma,* 754 P.2d 845 (N.M. 1988), *cert. denied,* 490 U.S. 1029 (1989).

It would be of great national benefit for the Court to resolve this conflict of federal law among state courts of last resort. *See, e.g., Padilla,* 490 U.S., at 1029-30 (White, J., dissenting from denial of certiorari). The scope of tribal sovereign immunity is a function of federal law. It would be undesirable to have fifty states adopt different and irreconcilable interpretations of federal law.

Resolution of these conflicts is becoming more critical as Indian gaming becomes more prevalent and more profitable.

III. IMPORTANT SIMILAR ISSUES ARE PENDING BEFORE THIS COURT

Petitions for certiorari are pending before this Court in two other cases raising similar issues. The pending cases are *Gavle, supra,* No. 96-1215, docketed January 30, 1997; and *Setchell v. Little Six, Inc.,* No. 96-8834, docketed April 30, 1997. Both cases also involve claims against Little Six.

All three cases raise questions of national importance regarding conduct of business with tribal corporations.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Minnesota Supreme Court.

June 9, 1997 Respectfully Submitted,

GREGORY ANDREW ABBOTT
Counsel of Record
Abbott & Baruch, Ltd.
431 South Seventh Street, Suite 2424
Minneapolis, Minnesota 55415
(612) 333-9158

CLINTON COLLINS, JR.
Clinton Collins & Associates, P.A.
821 Marquette Avenue, Suite 2500-F
Minneapolis, Minnesota 55402
(612) 373-0991

Attorneys for Petitioner

STATE OF MINNESOTA

IN SUPREME COURT

C6-95-928

Sylvia Cohen,

Appellant,

vs.

Little Six, Inc., d/b/a Mystic Lake Casino,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for rehearing filed in the above-entitled matter be, and the same is, denied.

Dated: March 11, 1997

BY THE COURT:

s/ A.M. Keith

Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C6-95-928

Sylvia Cohen,

Appellant,

vs.

Little Six, Inc., d/b/a Mystic Lake Casino,

Respondent.

ORDER

WHEREAS, by order filed on April 16, 1996, this court stayed all proceedings pending final disposition by this court in *Gavle v. Little Six, Inc. d/b/a Mystic Lake Casino,* 534 N.W.2d 280 (Minn. App. 1995), *pet. for rev. granted* (September 28, 1995); and

WHEREAS, the court issued its decision in *Gavle* by its filing on October 31, 1996 and that decision is controlling;

IT IS FURTHER ORDERED that the decision of the court of appeals filed February 13, 1996 in the above-entitled matter be, and the same is, affirmed without further proceedings. *See Gavle v. Little Six, Inc.,* 555 N.W.2d 284 (Minn. 1996).

Dated: January 21, 1997

BY THE COURT:

s/ A.M. Keith

Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C6-95-928

Scott County — Short, Judge
District Court File No. C9501701 — Dissenting, Randall, Judge

Sylvia Cohen,

Appellant,

vs.

Little Six, Inc., d/b/a
Mystic Lake Casino,

Respondent.

Filed: February 13, 1995
Office of Appellate Courts

Clinton Collins, Jr.
Janie L. Fink
Clinton Collins & Assoc., P.A.
821 Marquette Avenue
Suite 2500F
Minneapolis, MN 55402

Steven F. Olson
BlueDog, Olson & Small,
P.L.L.P.
5001 W. 80th Street, Suite 670
Minneapolis, MN 55437

Joseph Plumer
McDonough, Wagner &
Sherry, P.A.
14501 Granada Drive,
Suite 200
Apple Valley, MN 55124

SYLLABUS

A business corporation created under tribal law, owned and controlled by the tribe, and operated for governmental purposes enjoys sovereign immunity. State courts have no subject matter jurisdiction over such a corporation under Public Law 280, 28 U.S.C. § 1360. In the absence of an applicable federal statute, state courts cannot assert jurisdiction over disputes arising entirely on the territory of an Indian reservation.

Affirmed.

Considered and decided by Randall, Presiding Judge, Short, Judge, and Peterson, Judge.

OPINION

SHORT, Judge.

Sylvia Cohen argues an Indian gaming casino is subject to the jurisdiction of Minnesota state courts, and the trial court erred or violated her due process rights by dismissing her personal injury suit against Mystic Lake Casino.

FACTS

On October 7, 1994, Sylvia Cohen entered Mystic Lake Casino in Prior Lake, Minnesota. As Cohen attempted to sit on a chair in front of a slot machine, the chair "snapped from underneath her," and Cohen fell to the floor. She claims the fall caused injuries that required hospitalization.

Cohen brought a personal injury action against Little Six, Inc. (LSI), d/b/a Mystic Lake Casino. LSI was created by tribal ordinance and is owned and controlled by the Shakopee Mdewakanton Sioux Commnunity ("community"). The community is a federally-recognized Indian tribe, which

operates under a constitution approved by the Secretary of the Interior. The casino is located on reservation land.

Without answering the complaint, LSI moved to dismiss on the basis of lack of jurisdiction. The trial court held LSI enjoys sovereign immunity, and dismissed Cohen's lawsuit for want of jurisdiction.

ISSUES

I. Do Minnesota state courts have jurisdiction over a dispute in which the sole defendant is a tribal business corporation, controlled by the tribe for governmental purposes, and the underlying events occurred entirely on an Indian reservation?

II. Does dismissal for want of jurisdiction violate Cohen's right to due process?

ANALYSIS

The jurisdiction of courts and the constitutionality of state action present questions of law, which we review de novo. *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) (reviewing the trial court's jurisdictional rulings de novo); *see Estate of Jones v. Kvamme*, 529 N.W.2d 335, 337 (Minn. 1995) (evaluating the constitutionality of a statute de novo). We are asked to decide whether state courts possess jurisdiction over a tort claim brought against a tribal corporation, controlled by the tribe for governmental purposes, for injuries sustained on the reservation and whether dismissal for want of jurisdiction infringes on Cohen's constitutional right to due process.

I.

While sovereign immunity and lack of subject matter jurisdiction both deprive courts of the authority to hear certain matters, they differ in that parties may waive the former jurisdictional defect, but not the latter. *In re Prairie Island Dakota Sioux,* 21 F.3d 302, 304-05 (8th Cir. 1994).

A. *Sovereign Immunity*

Indian tribes have long possessed the immunity enjoyed by sovereigns at common law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S Ct. 1670, 1677 (1978). While Congress has enacted many exceptions to the absolute immunity enjoyed by *foreign* sovereigns, these restrictions do not apply to sovereign Indian communities. *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 681 (1994); *see Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.) (refusing to apply "commercial exception" of the Foreign Sovereign Immunities Act to Indian communities), *cert. denied*, 116 S. Ct. 57 (1995); *see also* 28 U.S.C. §§ 1602-1611 (1988) (Foreign Sovereign Immunities Act of 1976). Absent a clear congressional or tribal waiver, common law notions of immunity apply to Indian tribes. *Sac & Fox Nation*, 47 F.3d at 1063 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991) and *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677). Any waiver must be express and unequivocal and cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct at 1677 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953-54 (1976) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 1503 (1969))).

Cohen argues the trial court erred in allowing LSI, a separate legal entity, to assert the tribe's sovereign immunity

as a jurisdictional defense. However, case law establishes that a corporation organized under tribal laws, controlled by the tribe, and operated for governmental purposes can assert the tribe's immunity as a defense. *See, e.g., Elliott v. Capital Int'l Bank & Trust*, 870 F. Supp. 733, 733-35 (E.D. Tex. 1994) (dismissing, on immunity grounds, an action against a limited liability bank, which was chartered, governed, and owned by an Indian tribe); *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23, 26 (D. Minn. 1974) (acknowledging tribes can confer immunity upon tribally-owned and -created corporations), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 378, 383-84 (Minn. 1979) (determining a tribally-created corporation fulfilling a governmental purpose was equivalent to the tribe, but lacked sovereign immunity because of an express *waiver); see also Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109-11 (Ariz. 1989) (holding a tribally-created corporation did not enjoy immunity because it was a simple business venture, having no responsibility for promoting tribal welfare or development). This approach is consistent with applications of the absolute common law immunity formerly enjoyed by foreign sovereigns. *See, e.g., In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum,* 13 F.R.D. 280, 288-91 (D.D.C. 1952) (recognizing a corporation's power to invoke sovereign immunity because it was organized under British law, was controlled by the British government, and served the government's purpose of ensuring access to oil). Even under the restrictive view of sovereign immunity, corporations owned by foreign governments are entitled to assert immunity unless they fall within an exception contained in the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1603(a) (a "foreign

state" includes its agencies and instrumentalities), 1603(b) (an "agency or instrumentality of a foreign state" includes an entity in which the foreign state holds a majority share), 1604 (a "foreign state" enjoys immunity unless it falls within one of the act's exceptions).

The record establishes: (1) LSI was created by tribal ordinance; (2) the community owns LSI's single share of stock; (3) members of the tribe's General Council may call special meetings of the corporation; (4) all community members may vote at LSI meetings; (5) LSI cannot exercise many of its powers, including approval of its annual budget, without consent of the tribe's voting members; and (6) LSI's purpose, as set forth in its articles of incorporation, is to "seek * * * to improve the business, financial, or general welfare of the Corporation, the Members of the Corporation, and the Community." Raising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose. Because the tribe created, owns, and controls LSI to further a legitimate governmental purpose, LSI is entitled to assert the tribe's sovereign immunity. *But see Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995) (considering LSI's activities nongovernmental in nature), review granted (Minn. Sept. 28, 1995).[1]

Cohen also argues operation of a gaming hall under the authority of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1988 & Supp. V 1993), is a waiver of sovereign immunity. However, that statute creates only a limited waiver. *See Maxam v. Lower Sioux Indian Community*, 829 F. Supp. 277, 281-82 (D. Minn. 1993)

---

[1] However, under a common law sovereign immunity analysis, the activity's purpose, not its nature, controls the result. *See In re World Arrangements*, 13 F.R.D. at 288-91 (recognizing the immunity of governmental corporation because of the purpose it served).

(holding the IGRA waives sovereign immunity for enforcement actions, but not suits for money damages); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 745 (D.S.D. 1992) (same); *see also Davids v. Coyhis*, 869 F. Supp. 1401, 1407, 1410 (E.D. Wis. 1994) (holding the IGRA does not waive sovereign immunity even for enforcement actions). LSI's operation of a gaming hall subjects it to a non-tribal court's authority to enforce compliance with the IGRA, not claims for money damages.

Cohen also argues the community waived sovereign immunity by registering as a foreign corporation in Minnesota. *See* Minn. Stat. § 303.13, subd. 1 (1994) (subjecting registered foreign corporations to service of process). However, appointment of an agent for the service of process waives only personal jurisdiction defenses, not sovereign immunity. *Canadian Overseas Ores v. Compania de Acero del Pacifico,* 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2nd Cir. 1984); *see Duluth Lumber*, 281 N.W.2d at 383 (holding that an entity subject to state court jurisdiction may still assert sovereign immunity as a defense).

Cohen further argues registration as a foreign corporation constituted a waiver of sovereign immunity because foreign corporations "shall be subject to the laws of this state." Minn. Stat. § 303.09 (1994), While that statute provides a means of gaining personal jurisdiction, it does not waive sovereign immunity. *See Rykoff-Sexton, Inc. v. American Appraisal Assocs.,* 469 N.W.2d 88, 90 (Minn. 1991) (applying the statute as a means of gaining personal jurisdiction); *State ex rel. Ohsman & Sons v. Starkweather*, 214 Minn. 232, 235-36, 7 N.W.2d 747, 748-49 (1943) (describing the statute's function as a method of achieving personal jurisdiction over a foreign corporation); *see also*

Canadian Overseas Ores, 528 F. Supp. at 1346 (submission to personal jurisdiction does not waive sovereign immunity); *Duluth Lumber*, 281 N.W.2d at 383 (concluding that, even if the court otherwise had jurisdiction, tribal sovereign immunity might bar suit). Even if we concluded the statute amounted to a choice-of-law provision, there is no basis on which to find a clear and unequivocal waiver of sovereign immunity. *See American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-81 (8th Cir. 1985) (finding no waiver of sovereign immunity in a promissory note containing a choice-of-law clause). While a choice-of-law clause sets forth the rules governing the parties' duties and obligations, it does not constitute an explicit statement that the parties have agreed to submit disputes regarding those rules to adjudication in a particular forum. *See id.* at 1380-81 (implying courts should not transform a choice-of-law clause into a choice of forum). By registering in Minnesota as a foreign corporation, the community did not unequivocally waive sovereign immunity.

B. *Subject Matter Jurisdiction*[2]

By virtue of the United States Constitution, the federal government enjoys paramount authority over Indian tribes. *Williams v. Lee,* 358 U.S. 217, 219-20 & n.4, 79 S. Ct. 269, 270 & n.4 (1959); *Maryland Casualty Co. v. Citizens Nat'l*

---

[2] Although the trial court never reached the question, LSI argues Minnesota state courts lack subject matter jurisdiction over this case. While we typically review only questions decided by the trial court, subject matter jurisdiction presents an issue falling outside of this general rule. *See* Minn. R. Civ. P. 12.08(c) (providing that a party may question subject matter jurisdiction at any time); *Berke v. Resolution Trust Corp.*, 483 N.W.2d 712, 714 (Minn. App. 1992) (resolving a claimed lack of subject matter jurisdiction raised for the first time on appeal), *review denied* (Minn. May 21, 1992).

Bank, 361 F.2d 517, 520 (5th Cir.), cert. denied, 385 U.S. 918, 87 S. Ct 227 (1966). Thus, state courts cannot exercise subject matter jurisdiction over Indians or activities on Indian lands unless a federal statute provides for such jurisdiction, or the exercise of jurisdiction will not infringe upon Indians' right to self-governance. *Williams*, 358 U.S. at 220, 79 S. Ct. at 270-71; *Duluth Lumber*, 281 N.W.2d at 380-82.

Public Law 280 (28 U.S.C. § 1360(a) (1988)) provides Minnesota state courts shall, except with regard to activities occurring on the Red Lake Reservation, "have jurisdiction over civil causes of action between Indians or to which Indians are parties." While Public Law 280 applies to actions involving "Indians," this grant of jurisdiction does not apply to Indian *tribes*, thus preserving the vitality of Indian sovereignty and preventing the transformation of Native American communities into "little more than 'private, voluntary organizations.'" *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 388-89, 96 S. Ct 2102, 2111 (1976) (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 718 (1975)). Thus, the federal statute's jurisdictional gap protects against infringement on the tribe's status as a sovereign. *See Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1139 (D. Alaska 1978) (construing Public Law 280 as having more in common with sovereign immunity than with traditional notions of subject matter jurisdiction). Under these circumstances, it would be illogical to impute the tribe's status to LSI for sovereign immunity purposes, but to prevent LSI from sharing other jurisdictional defenses designed to safeguard the tribe's sovereign status. *See In re World Arrangements*, 13 F.R.D. at 290-91 (allowing a British corporation to assert sovereign immunity because it was owned and controlled by Britain for a governmental purpose and, thus, was indistinguishable from the sovereign). As a

consequence, we construe Public Law 280 as inapplicable to tribal corporate entities that are equivalent to the tribe for purposes of sovereign immunity. *See Bryan*, 426 U.S. at 388-89, 96 S. Ct at 2111 (holding Public Law 280 does not confer jurisdiction over tribes); *Duluth Lumber*, 281 N.W.2d at 378, 383-84 (treating a tribally-created corporation, serving a governmental purpose, as the tribe); *cf. Parker Drilling*, 451 F. Supp. at 1139 (holding a federally-incorporated tribe not to be an "Indian" for purposes of Public Law 280).

In the absence of a federal law authorizing state court jurisdiction, states may exercise jurisdiction over matters involving Indians if doing so will not infringe on their right to self-governance. *Williams*, 358 U.S. at 220, 79 S. Ct. at 270-71; *Duluth Lumber*, 281 N.W.2d at 380-82. If jurisdiction does not attach under Public Law 280 and the disputed events occurred wholly within the confines of an Indian reservation, state court jurisdiction over the matter interferes with tribal self-governance. *Duluth Lumber*, 281 N.W.2d at 382. Because we conclude jurisdiction is unavailable under Public Law 280 and the events giving rise to Cohen's cause of action transpired wholly within the reservation, we lack authority to hear the merits of this action.[3]

II.

---

[3] Even if the trial court had concurrent subject matter jurisdiction over this dispute, federal policy would require it to abstain from acting with regard to the matter until after its final resolution in tribal court. *See Bowen v. Doyle*, 880 F. Supp. 99, 123, 127 (W.D.N.Y. 1995) (holding even if they have jurisdiction and the matter is not currently pending before a tribal court, state courts must abstain from hearing suits arising on reservations until after tribal courts have resolved the matter); *Smith v. Babbitt*, 875 F. Supp. 1353, 1366-67 (D. Minn. 1995) (stating a non-tribal court must abstain from hearing a matter arising on Indian land until the plaintiff has exhausted its remedies in tribal court).

Cohen argues the jurisdictional immunities afforded to Indian tribes leave her without a remedy and, thus, violate her right to due process. We disagree. Cohen has not been deprived of her day in court, but only of her day *in the court of her choice. See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992) (finding no due process violation in the relegation of the plaintiff's claim to tribal court). Moreover, there is no state action that is necessary to a due process claim; the tribe's assertion of sovereign immunity is not an affirmative act, but a claim of status. *Greene*, 980 F.2d at 596. Similarly, a proper dismissal for lack of jurisdiction serves merely as recognition of the court's lack of authority to act. *See Duenow v. Lindeman*, 223 Minn. 505, 511, 27 N.W.2d 421, 425 (1947) (quoting *Sache v. Wallace*, 101 Minn. 169, 172, 112 N.W. 386, 387 (1907) and stating subject matter jurisdiction is the "authority to hear and determine the particular questions the court assumes to decide").

DECISION

First, LSI may assert the tribe's sovereign immunity. Second, no federal statute authorizes state jurisdiction over this case and state court jurisdiction would infringe on tribal self-governance. And third, by dismissing this action for want of jurisdiction, the trial court did not violate Cohen's right to due process.

Affirmed.

12-18-95 Marie D. Short

RANDALL, Judge (dissenting)

A treaty is a contract.
A contract is a promise.

"The government made us many promises, more than I can remember, they never kept but one, they promised to take our land and they took it."

Red Cloud (Mahpiua Luta)
Oglala Lakota

> The government could not keep its own citizens out of the Sioux lands, any more than it had been able to keep them out of any other Indian treaty land, in spite of solemn pledges, since the time when the land just across the Appalachians was the West. It was now up to the Indian Bureau to find some way to legalize this latest trespass.
>
> * * * *
>
> Actually, there was no writing of treaties with Indian tribes after 1871, when the entire ridiculous pretense that tribes were sovereignties was abolished. It would be pleasant to be able to report that the change was made because common sense prevailed, but such was not the case.

Ralph K. Andrist, The Long Death: The Last Days of the Plains Indian 246 (1993) (emphasis added).

Justice Blackmun, in Puyallup Tribe, Inc. v. Department of Game State of Wash., expressed doubts about the "continuing vitality in this day of the doctrine of tribal immunity" and suggested that "the doctrine may well merit re-

examination in an appropriate case." 433 U.S. 165, 178-79, 97 S. Ct. 2616, 2624 (1977) (Blackmun, J., concurring). Justice Stevens later declared the doctrine of sovereign immunity to be "founded upon an anachronistic fiction." Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 514, 111 S. Ct. 905, 912 (1991) (Stevens, J., concurring).

> Moreover, mere casual inquiry reveals that by and large the governmental powers actually exercised by contemporary tribal governments are those gratuitously granted by the federal government. Those powers are found in the Indian Reorganization Act of 1932, an Act of the United States Congress. Besides being severely limited in scope, those powers can be amended, or eliminated for that matter, at the whim of Congress. Thus, the governmental powers exercised by contemporary tribal governments are more illusion than real.

Robert A. Fairbanks, The Tribal Sovereignty More Illusion Than Real, **The Native American Press/Ojibwe News**, Nov. 3, 1995, at 4.

I respectfully dissent. As the majority sets out, appellant Sylvia Cohen was injured in the Mystic Lake Casino in Prior Lake, Minnesota. The casino is managed by respondent Little Six, Inc. (LSI), d/b/a Mystic Lake Casino. LSI is a branch and a part of the Shakopee Mdewakanton Sioux (Dakota) Reservation. Appellant commenced a standard personal injury action against respondent in the Minnesota District Court for Scott County, wherein the Shakopee reservation lies.

Respondent essentially asserts that the Mystic Lake Casino is an authorized branch of the tribal government of the reservation and thus asserts that the reservation is immune from lawsuits of this type, subject to certain narrow exceptions. It asserts that no such exception exists here.

Sovereignty I.

Respondent's primary defenses center around its contention that Indian tribes are "sovereign" and thus may exercise inherent sovereign powers, which include immunity from lawsuits, unless they expressly waive this "sovereign immunity" and consent to be sued.

Respondent raises other arguments as well, all of which have the claim of sovereignty at their core. For example, it argues that the reservation's tribal court has original jurisdiction over this matter, if anyone does, and appellant must first take her claim to tribal court. Respondent additionally argues its casino is a tribal enterprise and that reservation's interests strongly outweigh the state's interest in providing Minnesota citizens access to Minnesota district courts for civil lawsuits. Respondent further argues that appellant's lawsuit impermissibly infringes on tribal interests that have been recognized by the federal government and that those tribal interests include an Indian tribe's right to protect its tribal assets, its culture, its identity, its religion or spirituality, and its right to self-governance and self-determination. All of these arguments are based on sovereignty.

Respondent concedes there are already many recognized inroads to this concept of "sovereignty." There may be federal and state jurisdiction over criminal matters on Indian reservations. Public Law 280, which includes the State of

Minnesota, specifically confers certain jurisdiction on state district courts for incidents happening on reservations. See 28 U.S.C. § 1360(a) (granting Minnesota courts limited civil jurisdiction over actions "between Indians or to which Indians are parties" and "which arise in the areas of Indian Country"). Respondent argues that Public Law 280 does not apply to this set of facts because it, as a defendant in a personal injury lawsuit, is not an individual Indian, but is an Indian tribal enterprise, and that Public Law 280, to date, has been construed to not include tribes within its purview. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 389, 96 S. Ct. 2102, 2111 (1976). Be that as it may, the already recognized exceptions to claims of sovereignty are incompatible with any belief that there is true sovereignty on Indian land. True sovereignty and true immunity from Minnesota state courts and this country's federal courts exists in Canada and Mexico, for instance. Our neighbors to the north and south are, in every sense of the word, true sovereign states or sovereign nations. The reason is simple. They are not in the United States. On the other hand, respondent is in Minnesota, on Minnesota and U.S. land, and the reason for that is simple. Respondent is a Minnesota corporation, its residents are all full-blown Minnesota citizens and full-blown U.S. citizens, and respondent and its residents are every bit a part of this state, a part of this country, as the rest of Minnesotans.

The majority notes that respondent, to buttress its claim of sovereign immunity, registered as a "foreign" corporation in Minnesota. Respondent accurately describes itself, as "a corporation wholly-owned and operated by a federally recognized Indian Tribe (the Shakopee Mdewakanton Sioux (Dakota) Community)." I agree with respondent's characterization. If the Minnesota Secretary of State allowed filing as a foreign corporation, either because respondent is an

Indian tribe, or because respondent incorporated in Delaware or some other state, but registered here to do business here, it changes nothing.

As respondent states, it is the Shakopee Mdewakanton Sioux (Dakota) Community. Although the Plains Indians moved around hundreds of years ago without regard to the political borders we call "states," respondent, a branch of the Sioux Nation, has its historical roots in Minnesota. Virtually all of Minnesota at one time was "Dakota Country." A few hundred years ago, the Anishinabe Ojibwe, after a protracted and fierce struggle, drove the Dakota people south and west out of central Minnesota. But respondent's official name, "Mdewakanton," which they bear proudly, roughly translates into "Dwellers of the Spirit Lake." Spirit Lake, or Mystic Lake, is Lake Mille Lacs. Thus, respondent is historically grounded in Minnesota. Its official name, Mdewakanton, meaning literally from the Lake Mille Lacs area of Minnesota, distinguishes it from other branches of the Sioux Nation. The Yankton (South Dakota), and other subdivisions of the Teton Sioux (as respondent is) are also historically grounded in identifiable areas in a particular state. The Minniconju Sioux (Teton) are associated with the Cheyenne River reservation (South Dakota); the Hunkpapa Sioux (Teton) with the Standing Rock reservation, which borders North and South Dakota; the Oglala Sioux (Teton) are associated with the Pine Ridge reservation in South Dakota, and so on.

Further, all residents of respondent, including respondent's board of directors, elected chief, and council members, are full-bodied residents of the State of Minnesota. They are entitled to vote in Minnesota, go to public schools if they choose, run for public office in Minnesota if they choose, and in every bit of the term, are full normal Minnesotans. Minnesota owes them that. They are.

Respondent's residents do not vote in state and national elections in North or South Dakota, or Iowa, or Wisconsin. They are not residents of those states. Regardless of what state respondent chose for incorporation, its reservation, its people, its casino at issue, its headquarters, and its home land are in Minnesota. Thus, I will continue to use the term Minnesota corporation to describe respondent. If another court should choose to call respondent a foreign corporation, it would change neither my legal analysis one line, nor history one day.

Continuing on, as Andrist said, "the entire ridiculous pretense that tribes [are] sovereignties" should have been done away with a long time ago. Andrist, The Long Death at 246.

During World War II and the Vietnam War, a test of sovereignty presented itself. Essentially, American Indians raised the issue of whether they were citizens of the U.S. subject to the draft or whether they were sovereign or quasi-sovereign inhabitants of a sovereign or quasi-sovereign reservation and, thus, not subject to the draft. The federal courts listened politely and then ruled immediately that American Indians were U.S. citizens subject to the draft. See, e.g., United States v. Rosebear, 500 F.2d 1102 (8th Cir. 1974) (holding that induction of Indian, who was United States citizen within the meaning of the Selective Service Act, is not precluded from military service by quasi-sovereignty of Indian nations, lack of full citizenship by Indian people, or treaty commitments); Williams v. United States, 406 F.2d 704 (9th Cir. 1969), cert. denied 394 U.S. 959, 89 S Ct. 1307 (1969) (holding member of Western Shoshone Nation of Indians subject to Universal Military Training and Service Act and not exempt by Treaty between the United States and Western Shoshone); Ex Parte Green, 123 F.2d 862 (2d. Cir. 1941) (holding that even if treaty status between U.S. and Indian

tribe were valid, Congressional action superseded the treaties and made tribe member a citizen for purposes of WWII military service); United States v. Cook, 383 F.Supp 353 (N.D.N.Y. 1974) (holding that appellant was subject to Military Service Act of 1967 even though a member of Six Nations of Indians); United States v. Craig, 353 F.Supp. 121 (D.Minn. 1973) (court found no inconsistency in recognizing certain unique Indian rights pertaining to modes of self-government, hunting and fishing rights and in deeming Indians to be citizens within the meaning of Selective Service law.)

I am not at all surprised by the result. I can only note that, in time of war, this country has accepted volunteers from true foreign or sovereign countries. But we have not been in the habit of involuntary induction, drafting against their will, bona fide citizens of sovereign nations.

It can be noted that during World War II, foreign born people residing in America, who had not yet been naturalized or in other ways attained citizenship, were subject to the military draft. But the point is still made, as those foreign born residents were drafted only because they resided in the U.S. We were not drafting tourists from foreign countries nor were we drafting foreign born non-residents from foreign countries. We were drafting them because they lived here. In contrast, the American Indian's position was they could not be drafted off the reservation because it was sovereign or quasi-sovereign soil. That argument failed completely.

If during World War II and the Vietnam War we had drafted (with serious criminal penalties for refusal) sovereign or quasi-sovereign American Indians off of sovereign or quasi-sovereign non-American soil, and sent them to war, to fight honorably, to put themselves in harm's way, to suffer serious injury and death, I would like to be the lead plaintiff's attorney in that class action lawsuit. However, there never

was nor will there be any such lawsuit because, in truth, we were not doing anything of the kind. We were drafting full-blown U.S. citizens, residents of the individual states, into the armed forces, to serve honorably along with all other draftable males regardless of race or color.

While overseas and under fire, the American Indian was accepted and fully integrated. Why, when he returned to this country, do we put him back on a private enclave, unlike all other returning soldiers of color, and tell him that as long as you stay there, you are on some sort of "sovereign soil?" To me, it is the cruelest kind of joke, to trumpet "sovereignty," as we do here, by forbidding appellant, a Minnesotan, from suing a Minnesota corporate entity in Minnesota state court; but in time of war, this great shield of sovereignty is exposed for what it truly is, a Potemkin Village.

Respondent's brief repeats a long line of federal and state cases discussing the issues of Indian sovereignty. One of the seminal cases that respondent cites in support of its position and one that has never been expressly overruled is Cherokee Nation vs. State of Georgia decided in 1831. 30 U.S. (5 Pet.) 1 (1831). Actually, Cherokee Nation sets the record straight. The case sets out unequivocally that Indian tribes are not true sovereign states or nations. Cherokee Nation labelled the tribes "domestic dependent nations." Id. at 17. Cherokee Nation is accurate when it uses the term "domestic" as, by definition, American Indian tribes are in the U.S., not a foreign country. Cherokee Nation is totally accurate when it uses the term "dependent". The federal government has made Indian tribes wards of government since this country was founded right up to the present. I suggest this acknowledged dependency is not compatible with any claim of true sovereignty. See Id. (stating "[t]heir relation to the United States resembles that of a ward to his guardian.")

The Indian tribes' virtual total dependence on the federal government for money, grants, permission to build this, permission to buy or sell that, permission to get into the casino business, etc., is exemplified by the partial federal government shutdown in late 1995 and early 1996. Articles appeared in various Indian and non-Indian newspapers detailing the hardships on reservations because of the slow down or shutoff of the Bureau of Indian Affairs and other sources of federal support.

The federal government views its obligations to Indian reservations as real and mandatory. In contrast, unlike how we view foreign aid to true sovereign nations as an optional decision of each Congress and President.

Respondent, with its successful Mystic Lake Casino, and the Mashantucket Pequot, with its successful Foxwood Resort and Casino in Connecticut, may be exceptions to tribal dependency. But these two tribal casinos, out of the few hundred now dotting this country, are true exceptions.

In large parts of this country, the rule for reservations is that poverty, lack of adequate housing, medical care, educational opportunities, and work equal or surpass that of many Third World countries. This problem is partially due to the continuous conflicts between state law, federal law, and tribal constitutions, with the end result being there is often is no true line to authority with the power to look into conditions and issues and rule with the force of law what has to be done to correct the situation. On the other hand, townships, villages, cities, counties, etc. in the State of Minnesota have a known rule of law, state statutes and the Minnesota Constitution, to operate under, and its citizens have a clear line to a neutral detached judicial body with the power to hear and redress wrongs. We call it the Minnesota District Court system.

If we are honest, we must concede that hopes for a thriving multi-million dollar casino like Mystic Lake or Foxwood on every reservation, to cure all ills, is no hope at all. There is no guarantee the few eminently successful Indian casinos will have the ability forever to continue at their present levels. More importantly, there is absolutely no way that every single tribe in this country, large and small alike, will have a Foxwood or a Mystic Lake. The 50 states could not possibly absorb 500 to 2500 casinos of this type, of this size. We need to concede, because we must concede, that it would be impossible for all 50 states to have the equivalent of a Las Vegas and a Reno within their borders. That many casinos would kill each other off and drain vast amounts of money out of other businesses. The real issue is why are we putting the American Indian in a position where unless they get a successful casino off the ground, they remain in utter poverty. On some of the poorer Indian reservations in this country, their theoretical right to negotiate with the state for a gambling compact (providing they can entice outside investors and outside professional consultants into helping them in return for a large piece of the pie), would likely be traded for a chance at a real job, and a hot meal. Put another way, on what other class of our citizens do we impose the obligation to put up a gambling casino or some other economic enterprise before they are deemed worthy of the normal help and assistance we give to non-Indian Americans who do not have to first claim to be residents of some sovereign entity or tribe?

The truth of the matter is, Indian reservations and their inhabitants are semi-dependent or totally dependent wards of the federal government. This is reality. It is not sovereignty.

But somehow, through the years, "domestic dependent nation" has come to be used interchangeably with "sovereign

state", or "quasi-sovereign state", or "sovereign tribes", and different variations thereof.

Thus, the core issue which needs to be addressed prior to developing the actual facts of this case and discussing other issues such as tribal courts, self-determination, and the unquestioned need to protect Indian identity, culture, spirituality, and dignity, is sovereignty.

Any hint in Cherokee Nation (if there was any), and any inference or outright statement in any of its progeny that purports to treat Indian tribes as sovereign or quasi-sovereign entities was mush when it was written, and is mush today. "Dependent," yes. "Sovereign," not now, not ever. I do not care what we have said or put in writing. Our actions speak louder than our words. Sovereignty is a phrase we have mouthed for over 200 years, but this country has never, at any time, treated Indian tribes with any of the courtesy, nor respect accorded a true sovereign state or nation, such as a Canada, Mexico, Great Britain, etc. None of the normal attributes of a true sovereign nation or foreign county has ever been gifted to, or attributed to, Indian tribes. Real sovereignty includes, without limitation, the right to seal one's borders, declare war, make peace, coin one's own currency, design and distribute one's own postage stamps, nationalize essential industries such as radio, telephone, communications, steel, oil, nationalize industries belonging to foreigners, control immigration, set quotas, forbid emigration, apply for a seat in the United Nations, etc. Sovereignty is defined as:

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political

> power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.
>
> The power to do everything in a state without accountability,--to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.

Black's Law Dictionary, 1251 (5th ed. 1979).

Indians and Indian tribes, on the other hand, have been treated by this country, at times, in a way that would not be countenanced by the Geneva Convention or any of its predecessor rules of war controlling the treatment of prisoners and combatants.

Cherokee Nation itself is instructive. It discussed the intentions of the State of Georgia to uproot the Cherokee Nation from its historical lands and bodily force it out of the-state at gunpoint in violation of a treaty. The Cherokee Nation court indicated that there might be an injustice here, but solemnly concluded the poor Indians had no standing to sue and that the United States Supreme Court had no jurisdiction to hear their plea. In so holding the court stated:

> If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended,

this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

Cherokee Nation, 30 U.S. at 20.

The Cherokee court did leave us with the following:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their county are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

Id. at 17 (emphasis added).

Following Cherokee Nation, and other cases solemnly discussing Indian sovereignty, and right on through the rest of the 19th Century, as we pushed west to the Pacific Ocean, we either bought below the market price or stole virtually every acre of Indian land between the East Coast and the West Coast. During that time span, with dozens, if not hundreds, of state and federal court cases ringing with the solemn term "sovereignty", "domestic dependent nation", etc., this country was responsible for the Cherokee Trail of Tears in 1830; the Navajo Long Walk in the 1860s; the Sand Creek Massacre at Washita River in 1864; the violation of the Fort Laramie Treaty of 1868; the lengthy battle against Chief Joseph of the Nez Perce in the 1870s; the Wounded Knee Massacre of 1890; and other similar actions, too numerous to mention (but can be looked up and verified), totally incompatible with any version of sovereignty. Look at what we do, not what we say.

Could this conduct be justified if individual Indians were true foreign nationals of a true sovereign or foreign state? The answer is, of course not. This country, at its worst, has always given some nod to the rules of war, even under the most trying of combat conditions. The history of Indian warfare lacks this nod.

The history of Indian "warfare" lacks even the pretense that we were warring against sovereignties, as Congress and the President did not bother to go through the formalized process of declaring war against the Indians that we went through in the colonial war for independence, World War I, and World War II. At one time anyway, the formalized process by which Congress and the President declared war was thought essential to our concept of honor. Indian

warfare, including the intentional killing of noncombatants, women, and children, proceeded without this honor.

Could this conduct be justified because it was not until 1924 that the U.S. government got around to acknowledging that American Indians were official citizens of the United States? See Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 3, (now included in 8 U.S.C. § 1401). No, I do not think so. In roughly the same time frame, from 1800 to 1900, as we moved west and absorbed Indian country, the great waves of immigrants came to the United States. When they arrived, immigrants were all true foreign nationals of true foreign states. Although many, because of poverty, had to walk or ride by boxcars to homes and jobs, none were forcibly herded into boxcars at the point of a gun. None were taken hundreds of miles from lands that were concededly theirs and where they wished to live, to lands hundreds of miles away that were not theirs and where they did not wish to live. Only Indians.

The Fort Laramie treaty of 1868, and the history of the Black Hills, with its identity to the Plains Indians, particularly the Lakota/Dakota Sioux, Cheyenne, Arapaho, are instructive, cannot be denied, and represent, oh so well, our treatment of Indians and Indian tribes as a so-called sovereign people. First of all, to get from the East Coast to the Black Hills in South Dakota, we broke, or unilaterally modified or ignored, in whole or in part, every treaty which, if honored, would have kept us on the east coast.

Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, (1903), on treaties is instructive. Like Cherokee Nation, this United States Supreme Court case has never been overruled. Lone Wolf states, in part:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Id. at 566, 23 S. Ct. at 221.

Lone Wolf makes short work of sovereignty, in the sense that a Canada, a Mexico, or a Great Britain are true sovereigns. Lone Wolf makes it clear that Indian tribes are not.

> After an experience of a hundred years of the treaty-making system of government Congress has determined upon a new departure, --to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in § 2079 of the Revised Statutes: 'No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired.'

Id.

Lone Wolf repeats, not the sovereign status of Indians, but their dependent status:

> In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.
>
> * * * *
>
> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States.

Id. 187 U.S. at 565-67, 23 S. Ct. at 221-22.

Lone Wolf also put to rest any idea that the land beneath reservations is not United States soil, but rather, is land belonging to a foreign or sovereign nation:

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and

> dependent race. Be that is it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derive title from the Indians.

Id. 187 U.S. at 565, 23 S. Ct at 221.

Preceding Lone Wolf, we had Ward v. Race Horse, 163 U.S. 504, 16 S. Ct. 1076 (1896), telling us

> that 'a treaty may supersede a prior act of congress, and an act of congress supersede a prior treaty,' is elementary. Fong Yue Ting v. U.S., 149 U. S. 698, 13 Sup. Ct. 1016; The Cherokee Tobacco, 11 Wall. 621. In the last case it was held that a law of congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty.

Id. at 511, 16 S. Ct. at 1078.

I suggest Lone Wolf and Race Horse tell the truth.

Our attitude toward the Black Hills shows how we abandoned any pretense of the word "sovereignty" when it was deemed to be in our best interests. With the great expansion westward during the Civil War and post-Civil War era, a big public effort was made by the United States government and its military arm, the U.S. Army, to convince the Indians that westward expansion would halt at the Black Hills and that no further expansion into their territory would take place without their express consent. The Black Hills and

surrounding territories, including parts of other states, were recognized as Indian territory. As settlers moved west following the Civil War, the U.S. Army and a young cavalry officer by the name of George Custer were sent to the Black Hills to protect the Indians from illegal encroachment by white settlers, at least for a while. But when gold was discovered by the Army and some white prospectors in the Black Hills, the gold rush was on, and settlers, miners, prospectors, and land speculators began to pour into what was concededly Indian territory. The U.S. government and its military arm now had an important decision to make. Would it use the Army to protect the Indians from the illegal trespass, and in the process run the risk of having to injure, or even kill, white trespassers, or would the U.S. Army, in violation of the treaty, move into the Black Hills Indian territory and protect white trespassers, while running the risk of having to injure and possibly kill Indians. We made the obvious choice.

To argue there is any vitality to the word sovereignty is to ignore history.

America and the United States, had two chances to confer true sovereignty upon Indians. The first missed opportunity was not our fault. The second was. The first opportunity belonged to Columbus, who in 1492, because of a cloudy sextant, dropped anchor in the Caribbean, and loudly proclaimed that he had found India and was now going to trade. If he had gone ashore, looked around and tried to communicate intelligently with the native people living there, he could have ordered his crew back onto the ship and said, "Come on boys, this is somebody else' s land. We are turning around and going back to our home. We will tell other Europeans to stay in Europe." He did not do that.

The second time, the U.S. had the opportunity to confer true sovereignty on Indian people and Indian tribes and treat them as such. That opportunity came at the front end of our westward expansion. The Mississippi River, stretching virtually from the Canadian border south to the Gulf of Mexico and present day Louisiana was a recognizable, distinct and easily ascertainable border (just follow the river). At that time, there was even some discussion about recognizing it as a firm border between the U.S. and Indian country. But like all other discussion concerning Indian rights, it did not translate into action. We could have recognized the Mississippi as our national border just as we recognize the Rio Grande as the border between the southwestern U.S. and Mexico, or as the northern border between the U.S. and Canada is recognized. Then, whatever the Indian tribes did west of the Mississippi would have been their own business. They could have continued to roam free in small bands, or organized into counties, regions, or provinces. In other words, they would have had the same options citizens of Mexico and Canada have. But we did not. Instead, we did the following:

1851

Treaty of Traverse des Sioux. After years of mounting pressure from white settlers and facing huge debts to fur traders, the people of the Eastern Dakota Nation sign a treaty giving up all of their lands west of the Mississippi River. However, the U.S. Senate strikes out the provision granting the Dakota a reservation in Minnesota. Territorial governor Alexander Ramsey saves the deal by getting the president to allow the Dakota a reservation on a five-year lease. The Dakota are relocated to a strip

of land bordering the Minnesota River in west-central Minnesota.

1858

Dakota leaders on a diplomatic visit to Washington D.C. are told they did not own the reservation land. Faced with more debt and threatened with expulsion, they are forced to sell the northern half of their reservation.

Timeline of Events Leading Up to the Dakota Conflict and Exile, **The Native American Press/Ojibwe News**, Jan. 18, 1996, at 8.

Two of Minnesota's storied historical figures, Alexander Ramsey and Henry Sibley, were leaders in this land grab of Dakota Country by Minnesota.

Another article in this newspaper shows in stark detail how after the American Indian was pushed just west of the Mississippi River, the pushing continued unabated through western Minnesota, and all of South and North Dakota (Dakota Territory), continuing into Nebraska and Montana, and finally in 1871, a part of the few tribes remaining, particularly some of the Dakota Sioux, accepted the inevitable and fled north into Canada. They did not stick around to await the inevitable, which would have been getting pushed into the Pacific Ocean!

We had the chance to confer true sovereignty upon Indian tribes in the grasp of our hands. Instead, we opted for make believe sovereignty, as we have now, and pushed forward to the west with a governmental policy, that at times involved extermination and genocide, and at other times involved pushing the Indians west, south, and north, onto the most undesirable parts of the territory and states we developed.

Today, there are a few tribes whose reservations contain some valuable oil, gas, mineral, coal, and timber rights. The Navajo (Diné) in New Mexico and Arizona, the Crow in Montana, the Cherokee in Oklahoma, to mention a few, do have in some places valuable natural resources. However, this is entirely due to accident, not by design.

Ralph K. Andrist, in his book The Long Death: The Last Days of the Plains Indian, recounts in detail the period of westward expansion that I have just touched on.

I note that some of the precedent cited in the case before us mentions treaties as some sort of foundation for "Indian sovereignty." I join with Andrist in asking: Why did anyone pay attention to this "ridiculous pretense?" Honestly, I believe it is best that we do not bring up the term "treaty." My question would be, which one? I know of no major treaty that we have not broken. If the U.S. and its constituent states started talking seriously about treaties, I suggest we Indo-European Caucasians, African-Americans, and Asian Americans pack our bags, book passage on the next steamer, and head back to where we came from.

If treaties are to be honored, then we are on someone else's land.

The final word on treaties is best expressed by the United States Supreme Court in Lone Wolf, when it states that when all is said and done, Congress has complete power over Indian tribal property and Congress can abrogate the provisions of an Indian treaty at any time. Lone Wolf, 187 U.S. at 566, 23 S. Ct. at 221.

Reading Cherokee Nation, Lone Wolf, and other federal cases solemnly discussing Indian sovereignty, as if it were a viable issue, I feel as if I am in a time warp, reading Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), or Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, (1896), as if these

cases were still the law of the land. I note that in Plessy, Justice Harlan, the lone dissenter, watching the Court give continued life to separate but equal by solemnly discussing whether colored people could be kept separate from white people as long as they were "kept equal" to white people, made the same observation that I make today watching the court's solemn discussion about Indian sovereignty:

> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

Id. at 559, 16 S. Ct. at 1146 (J. Harlan, dissenting).

If Justice Harlan were alive today, I suggest he would state that he did not write the dissent in Plessy. I suggest he would state that he wrote the majority, that he wrote the law of the land, but that it took the Supreme Court and this country 58 years, until Brown v. Board of Education decided in 1954, to realize it. See Brown v. Board of Education of Topeka, 347 U.S. 483, 495, 74 S. Ct. 686, 692 (1954) (holding "separate but equal" treatment of races is unconstitutional).

The parties here are all Minnesotans, and all Americans. That gets lost in the shuffle of sovereignty. Any argument that American Indians are different from the rest of us and, therefore, are sovereign or quasi-sovereign, and reside on sovereign or foreign land, is put to rest by our actual treatment of them, and by the fact that in 1924 by the Citizenship Act, we conferred full U.S. citizenship on American Indians.

The State of Minnesota, and its residents, whether Indian or non-Indian, are not in any way, shape, or form a true sovereign. We might carelessly throw the term around, but in truth, we are not. We are individual citizens of a state that is

part of a highly organized federation of states, comprising one indivisible sovereign, the United States of America. This state, and the other 49 components, might throw the term "sovereign" around at the quadrennial presidential nominating conventions, as in "the Great Sovereign State of Florida casts 42 sunshiny orange juice filled votes for candidate "x," the next great president of this here great U. S. of A." But after the convention we are all back to being just states within one indivisible country.

For instance, Minnesota is "sovereign or independent" of North Dakota, to the extent that on our election day, North Dakota residents (those who have no intention of changing that status), cannot pour willy-nilly across our border and vote in, or run for local and state office. But neither Minnesota as a state, nor its individual citizens, is sovereign to the point where its legislature/courts could, for instance, unilaterally declare us free of the draft should it ever be reinstated. Minnesota is not a true sovereign. The Minnesota legislature/courts cannot declare, for example, that any Minnesotan 18 years of age or older can run for president of the United States. Nor does the State of Minnesota and its legislature/courts have the power to rule that no Minnesotan can ever be president. If we had such enumerated powers, we would be sovereign. We do not, we are not. The Minnesota Indian is right there with the rest of the non-Indian Minnesotans. We are all equally endowed with the same rights, the same privileges, the same obligations, and the same limitations.

I note that waiting until 1924 to "confer full U.S. citizenship on American Indians," has to redefine "irony". The earliest anyone else in this country can claim to have relatives born here is the 17th Century.

We took this land, by fire and sword, from its owners of record, the British, who took part of it from the Indians and the French. We then took all the rest.

Most U.S. citizens trace their ancestry back perhaps 50 to 200 years. Precious few insist they have blood lineage to someone who set foot on Plymouth Rock or at Jamestown. The Anishinabe/Ojibwe trace their roots in northern Minnesota back a few thousand years. Certain tribes in southwestern U.S. trace their ancestry back perhaps 10 to 20 thousand years. Whether Columbus or Viking explorers were the first European to set foot on this continent is of no consequence. The Hopi Village in northern Arizona, and the Acoma Pueblo (Sky City) in New Mexico compete for the title of the oldest continuously occupied town or settlement in the U.S. Both can show proof of an active civilization from approximately 800 to 900 A.D. to the present.

Put another way, to say that Columbus discovered America, is to state that Sri Lanka discovered NFL football.

Even the politically correct term we use today for Indians, which is "Native Americans," although accurate, is subliminally patronizing. If we feel a need to add the modifier "Native" to the term Americans, the rest of us ought to call ourselves "recently arrived" or "transplanted" Americans. If any modifier is needed preceding the term Indian, it ought to be "first American" or "real American" or "true American." That they have not been treated as such cannot deny the fact that they are. The doctrine of sovereignty that we are discussing today is a myth that never existed. Andrist and I agree, the reality of history cannot be ignored.

That American Indians should own this country, should be its true sovereigns, and would be, if history could be rolled back, is a more than an interesting issue. But history cannot be rolled back. We cannot land at Plymouth Rock and then

turn around and go back east to our home. We can no longer stop at the Mississippi River, and we can no longer not occupy one foot west of it. We cannot give the Louisiana Purchase back to France and require France to give it back to the aboriginal indigenous people from whom they stole it. We cannot give Alaska back to the Russians and require Russia to give it back to the aboriginal indigenous people from whom they stole it.

Nor has it ever been seriously discussed, and I do not, whether we should undo the 1924 Citizenship Act and decide that since Indians are now not U.S. citizens, they ought to be afforded some kind of foreign national or sovereign status.

If one takes sovereignty to its natural and logical conclusion, would that mean when an American Indian immigrates off his or her reservation, would our Immigration and Naturalization Service come into play? Would Indians then need visas and passports to "come into town?" Then do we set quotas? Do we deny entry? That is exactly how we handle prospective visitors and/or immigrants from Europe, Central and South America, and other parts of the world. When you come to this country as a foreigner, a resident of a foreign or sovereign nation, you must come with an official status such, as a tourist with a passport and a temporary visa, or a work permit, or a visa for educational reasons. If you want to stay permanently, you are subject to quotas and depending on your job or occupation, your chances of gaining entry are either enhanced or decreased. With the American Indian, we do none of that. We ought not to, because we cannot. They are U.S. citizens and residents of an individual state.

I conclude we have to accept what we have done. We have to consider American Indians and their tribes as full co-equal citizens of both the United States and Minnesota. It

sounds strange to say that, because of course, we ought to; they are full Minnesotans. Thus, what is strange to me, is that despite the overwhelming, undeniable fact that Minnesota Indians are full Minnesotans and full U.S. citizens, we still persist in treating American Indians on some sort of parallel tract, some sort of "separate but equal" treatment which we denounced in 1954 with Brown v. Board of Education. I recall that Brown applied to all races and colors; I do not recall any exceptions.

Tribal Courts II.

Respondent further argues that appellant's rights can be fully vindicated in the reservation or community tribal court. Upon examination, Indian tribal courts suffer from two serious deficiencies, one possibly correctable, the other lethal.

The correctable deficiency is that tribal courts are not organized (I speak now of the State of Minnesota, but the same deficiency applies to every state) under the constitution of the State of Minnesota that frames our independent judiciary. That is, Article VI of the Constitution of the State of Minnesota. Tribal courts are also not subject to Article I, Section 4 of the Constitution of the State of Minnesota which guarantees to Minnesotans "the right of trial by jury."

Also, not all Indian judges in the State of Minnesota are attorneys licensed to practice law in the State of Minnesota (they do not have to be licensed because they are not under the jurisdiction of the Minnesota Supreme Court and the Minnesota Legislature). The various tribes with tribal courts retain the right to appoint whom they want. Respondent's attorney stated at oral argument that the tribal court judges for respondent's tribal court are attorneys. But if that be so for respondent now, it is not necessarily so for respondent in the

future, and it is not presently so for the various tribal courts throughout this State.

At times in our recent history, Minnesota tribal courts have had non-lawyers as judges, have had lawyers who have passed the bar in other jurisdictions, but not Minnesota, and lawyers who have never passed any bar. Indian tribal courts, unlike all other courts in Minnesota, are not under the direct supervision of the Minnesota Supreme Court. Normally, a plaintiff or defendant anywhere within the four corners of the State of Minnesota, whether a resident or non-resident, has a straight forward set of Minnesota rules and statutes that can be counted on for uniformity. The same is not true in the Indian tribal courts where the makeup, composition, rules and regulations, attitude toward state and federal precedent, and decisions when to give a jury trial or not, can and do differ.

A recent issue of Judicature was devoted to Indian tribal courts and justice. See 79 **Judicature** 109, Nov.-Dec. 1995. The issue was aimed at promoting the concept that they are viable and somehow can exist alongside the already established state and federal judiciaries which provide a legal forum for all citizens (Indian and non-Indian). To read the magazine is educational, but to me does nothing more than confirm the complete injustice of attempting to subdivide American citizens by race and establish parallel race-based court systems. I do not speak now of conciliation courts or alternative dispute resolution, or "talking circles." These are all forms of delivering justice to our people that must to be encouraged if we are to survive without drowning in the sea of bitter litigation and the bitter emotions that follow bitter litigation. What I am talking about is attempting to formalize a parallel Indian tribal court system purporting to have equal, and at times paramount, jurisdiction over state and federal courts.

The article entitled Resolving State-Tribal Jurisdictional Dilemmas is pointed, objective, and simply displays, at least to me, the insoluble incongruities, the justice denying anomalies that abound when we attempt to interject a third parallel race-based court system along side our two historical court systems. Id. at 154-56.

In commenting on the jurisdictional problems, the article notes the following examples:

> A non-Indian father is not prosecuted for misdemeanor abuse of his Indian child on an Indian reservation because the tribe lacks jurisdiction to prosecute non-Indians, the state lacks jurisdiction to prosecute offenses involving Indians and committed in Indian country, and the U.S. attorney lacks resources to prosecute misdemeanors.
>
> * * * *
>
> Tribal police decline to enforce a state domestic violence protective order recognized by the tribal court because they have no authority to arrest a non-Indian spouse for violating the order.
>
> * * * *
>
> A non-Indian spouse receives a default divorce and child custody decree in state court about the same time as the Indian spouse receives a similar decree in tribal court.
>
> * * * *
>
> These and similar occurrences are certainly fairly common and illustrate the problems inherent in limitations of tribal jurisdiction. Another hypothetical provides even more food for thought:

> Bonnie, an Indian, and Clyde, a non-Indian who resides with Bonnie in Indian country, rob the tribal casino, receive a speeding ticket in Phoenix, rob a convenience store in California, and trespass on the beach in Mexico. They could both be fully prosecuted by all jurisdictions in which they committed their offenses except the Indian tribal jurisdiction where they reside and where they committed the most serious crime. The tribe would only prosecute Bonnie for a misdemeanor and could not prosecute Clyde at all.

Stanley G. Feldman & David L. Withey, Resolving State-Tribal Jurisdictional Dilemmas, 79 **Judicature** 109, 154-55, Nov.-Dec. 1995.

Although I respect the right of Indian tribes to move for self-determination and will address that later in this opinion, I can appreciate appellant's lawyer's desire to have his client's civil suit involving issues of negligence and serious personal injuries, heard in a neutral state court with established known rules and procedures and a history of fair dealing.

This state, this country has the power to establish Indian tribal courts in total conformity with the laws of each particular state, and in total conformity with the rules controlling our federal judicial system. Do we have the will? If we deem Indian tribal courts essential and deem it appropriate for them to have jurisdiction within the rules, over people of all races, so that people of all races have access and do not feel intimidated, we can set them up within the framework of the Minnesota small claims or conciliation court system. See Minn. Stat. §§ 491A.01-.03 (1994) (establishing conciliation court system). Such a system would give a litigant direct access to state district court following an

adverse decision and then full appellate review by this court, with the right of petition to the Minnesota Supreme Court. A Minnesota conciliation court gives any locality the option of handling small or local issues internally, but protects each party's right to at least one hearing de novo in state district court. We also have the power to set up a standard Minnesota district court, state or federal, as the Minnesota Legislature or Congress chooses, organized exclusively, or for the most part, with Indian issues and staffed with Indian personnel. There are zero controls or regulations forbidding governors and presidents from actively recruiting and appointing qualified minorities to the bench. Since approximately the 1970s, at both the state and federal level, qualified women and candidates of color have been actively recruited and appointed to correct imbalances on state and federal benches where the bulk, or at times all, of the appointees were white males. We have the power and the right to correct this imbalance. Do we have the will?

The deeper issue is why we are even talking about "Indian tribal courts" where a Minnesota non-Indian venturing onto a reservation, as appellant did here, can have her direct constitutional access to state district court derailed. Appellant might accept this different, and even perhaps arbitrary, treatment if she were a tourist in Canada or Mexico. But she is not a tourist anywhere in this lawsuit. She is a Minnesota resident, dealing with a Minnesota corporation concerning an accident on land in Minnesota.

There are parts of this country, counties, or regions in the deep south, parts of the southwest, and sections of our large cities, where there are large concentrations of African-Americans, Hispanic, and Asian-Americans. For example, "Chinatowns" are viable and respected sections of at least two major cities, San Francisco and New York, that have been so

identified for decades. In these areas, well over 50% of the inhabitants may belong to a particular race or ethnic background. Why do we not have "African-American courts," "Hispanic courts," "Chinese courts," or "Korean courts?" Why do we not have special court systems in those areas where outsiders, that is, nonresidents, do not have automatic access to that state's district court system for redress of wrongs, but must first submit their claim to a local or ethnic court? I suggest that if we tried to establish "racially based courts," the constitutional issue of the denial of due process issue, the race-related and race-baiting issues, and the ill-will and divisiveness that would follow would serve to overcome us as a country.

We try to go out of our way in Minnesota, and hopefully other states in the federal court system do as well, to ensure equal access and fair treatment to all people, whether plaintiffs or defendants, of any race, color, creed or ethnic origin. Why here, are we tolerating segregating out the American Indians by race and allowing them to maintain a parallel court system and further, subjecting non-Indians to it? To me, this is red apartheid. I believe this entire issue of "sovereignty" rests on true red apartheid. The American Indian will never be fully integrated into this state, nor into this country, until we recognize this "dual citizenship" for what it really is, a pancake makeup coverup of Plessy which allowed "separate but equal" treatment. See Plessy, 163 U.S. at 551, 16 S. Ct at 1143 (holding that "equal but separate accommodations for the white and colored races" for railroad passengers was constitutional).

No further cite, other than this reference to Plessy is needed. I can only note, "Haven't we learned anything?"

The lethal flaw of Indian tribal courts is that they are not independent autonomous bodies. The tribal courts are not

independent of the executive and legislative branch of tribal government as is needed to ensure justice for the people who come before it. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and its progeny decided this a long time ago. Marbury is reference enough.

For a general review of tribal courts and the problems therein, and their differing formative stages throughout this country, I refer to Michael Taylor, Modern Practice in the Indian Courts, 10 **U. Pudget Sound L. Rev.** 231 (1987); The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 **Am. Crim. L. Rev.** 1279 (1994); Margery H. Brown & Brenda C. Desmond, Montana Tribal Courts: Influencing the Development of Contemporary Indian Law, 52 **Mont. L. Rev.** 211 (1991).

The essence, the sine qua non of tribal courts is that their existence rests on sovereignty. If sovereignty is exposed, there is no need for separate tribal courts. American Indians, like American blacks, American whites, American Asians, are already guaranteed equal access to our state and federal court systems.

The lethal flaw, the lack of an independent judiciary in Indian tribal courts, results from the fact that all tribal judges, including respondent's tribal judges, are appointed by the executive/legislative ruling body. The appointing authority for tribal judges might be called the reservation business committee, or the tribal executive committee, or the reservation board, or the community committee, but it is always the same. Those elected to run the reservation have full power to select, appoint, hire, and fire the judges. Tribal court judges may be "appointed" for a fixed term, but there is nothing inherently unconstitutional about their being fired or replaced in mid-term. They are simply not protected by the same constitution and the same rules governing Minnesota

judges, not to mention the constitution and rules protecting the independence of federal judges.

The situation on reservations, including on respondent's, can be likened to a situation where the mayor and city council of St. Paul and Minneapolis select and appoint all the judges who have jurisdiction in those two cities. If there is to be county-wide jurisdiction, the county commissioners in those two counties select, appoint, set the salaries for, and hire and fire the judges. Judges in those cities or those communities, like all well-intentioned judges, would strive to do their utmost to deliver justice. But the perception of potential conflict, and the actual conflict, when the defendants in a lawsuit were the appointing authority, is too big and too dangerous an elephant to ignore. In recent years in Minnesota, an Indian tribal judge in a lawsuit found for plaintiffs who were challenging the incumbents in a tribal election. The Indian judge found enough irregularities in the election to grant plaintiffs a hearing and limited discovery on the claimed election fraud. The incumbents, the executive/legislative branch of the tribe, whose election was being challenged, appealed to an Indian appellate court who upheld the tribal judge. The reservation business committee then fired the tribal judge.

I subscribe to three Indian newspapers: **The Circle**, **The Native American Press/Ojibwe News**, and **News From Indian Country-The Native's Native Journal.** One is a weekly, and two are monthly. Virtually every issue for the past three or four years has contained editorials and/or letters to the editor from residents of reservations, or those with reservation rights living off the reservation, complaining about the perceived arbitrary use of power by reservation governing bodies and the failure of the Indian tribal court to look into, let

alone correct, the alleged irregularities. One such editorial contained the following comment:

> And, most telling of all, the inability of the body politic of each reservation to rectify the corruption without the aid of the United States Attorney in collateral criminal proceedings proclaims to the State of Minnesota and the United States that at least two Minnesota Ojibwe reservations do not deserve the respect of a sovereign entity.

Robert A. Fairbanks, Leech Lake/White Earth Lawsuits Prove Disfunction of Tribal 'Sovereignty', **The Native American Press/Ojibwe News**, Dec. 14, 1995.

Another article contained the following:

> Seven members of the Turtle Mountain Band of Chippewa say their civil rights are being violated and want a federal judge to intervene in a year-long political battle.
>
> * * * *
>
> 'The tribal system is not providing remedies to members of the tribe,' said Lynn Boughey, a Minot attorney representing the seven. 'It's a state of anarchy.'

Turtle Mountain tribal Member to File Lawsuit Against Tribe, **Native Am. Press**, Feb. 2, 1996 at 1.

At times dissidents, out of desperation, have gone into the U.S. district courts for relief. That happened recently in Minnesota. A Minnesota federal district court judge ruled in

October of 1995 that the federal government does have the power to overturn a Minnesota Indian tribe's vote to change its rules in such a way that would allow more people to share in the gambling profits than previously shared. See Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 906 F.Supp. 513 (D.Minn. 1995) As one newspaper reported about the decision:

> The federal government has the power to overturn a Minnesota Indian tribe's vote to change its rules in a way that would allow hundreds of people to share profits from Mystic Lake Casino, a judge has ruled.
>
> U.S. District Judge Richard Kyle this week upheld a decision made in June by Ada Deer, director of the U.S. Bureau of Indian Affairs. Deer acted to nullify the referendum held in April by the Shakopee Mdewakanton Dakota Community.
>
> Questions were raised about the eligibility of some voters who stood to benefit financially from the rule change. Voters chose to waive blood requirements for descendants of current or former tribal members. Each member who is 18 or older is eligible to each receive about $500,000 a year in profits from the Prior Lake Casino.
>
> --Associated Press

Judge: Government Can Nullify Tribal Vote, **Minneapolis Star Trib.**, Oct. 26, 1995, at B-3.

Recently another newspaper reported:

> Tribal officials are not immune from prosecution in federal court for criminally violating the civil rights

of their constituents, according to a recent U.S. District Court opinion.

Jeff Armstrong, Court Rejects Sovereign Immunity Claims of Indicted White Earth Officials, **Native Am. Press**, Feb. 2, 1996, at 1.

Coincidentally, the reservation in question, with the voter eligibility issue, is respondent. Assumedly, the present governing body of the Shakopee reservation can appeal that decision through the federal court system. But "so much for sovereignty" and the exclusive right of tribal courts to hear disputes arising on reservations. This is an issue involving the eligibility of voters just on the reservation. Nowhere else in Minnesota. If there ever was such a thing as a truly private tribal issue, this would be it. If there was ever an issue perfectly fit for the independent tribal courts of a sovereign nation to decide without outside interference, this would be it. To the contrary, a Minnesota federal district court has jurisdiction. Now consider that Minnesota federal district courts are not in the habit of hearing election issues arising out of local or regional elections held in Canada or Mexico. I will not do any research on that subject. will guess that Minnesota federal district courts do not hear election issues arising out of local or regional issues in Canada or Mexico because our courts have no jurisdiction, because Canada and Mexico are sovereign nations. I will guess that a Minnesota federal district court heard an intratribal election issue on respondent's reservation because the Minnesota federal district court had jurisdiction because respondent's reservation is on U.S. land and subject to federal jurisdiction. The land might be called reservation land, or "Indian Trusts Land," but it is undeniably in America, and part of the United States of America.

This is yet one more example of why there is no real sovereignty on reservations, including respondent's. What there is, is a continuation of this ward of the government status that the U.S. government has never been able to deal with. It would be intolerable in the 1990s to even consider a system whereby all white Americans or all black Americans, or all Asian Americans, were for no reason other than color and race, designated dependent wards of the federal government. But somehow on reservations we tolerate this.

For what other classification of U.S. citizens, by color or race, do we tolerate a government agency with control over our lives. We have a Bureau of Indian Affairs (BIA), but we do not have a Bureau of Black Affairs, nor a Bureau of White Affairs, nor a Bureau of Asian Affairs, with the power to give funds, withhold funds, or permit people of that color to pursue a certain economic plan, but not others.

In speaking about our federal government's hope that somehow the BIA can make this all better without the necessity of really coming to grips with the issue of sovereignty, the myth of sovereignty as I and others call it, James Northrup, a noted Ojibwe writer and commentator from Northern Minnesota, recently had in his syndicated column, "Fond du Lac Follies" the following question and answer:

Question: Who invented the BIA?
Answer: Someone who really hated us!

The preservation of Indian tribal courts, without integrating them fully into our state and federal judicial system, is just one more bit of stark evidence that although we call Indians "Americans" (have to--they are), we treat them differently than we treat other Americans.

Preservation of Identity III.

The core issue, on which I agree with respondent, is that the protection of this tribe's (or any tribe's) culture, identity, assets, religion/spirituality, and ability to live in its own way is paramount.

But I can only note that these are exactly the same goals for all people in this state, for all colors and all races.

Respondent's members are citizens of Minnesota and full U.S. citizens. They can be treated as such, and must be treated as such. But more importantly, we can protect them as citizens and still protect their inalienable right to be different, as we do now with all other religions, races, colors, and ethnic groups. We do not have to pretend that Minnesota/American Indians are "sovereign" (which really means "wards of the government") to allow them to live as they want to live.

This country not only protects identifiable religions, but does so at a tremendous cost of hundreds of millions of taxpayer dollars, taken from individuals who in fact may not belong to any organized religion. We exempt from the normal burden of commercial and residential real estate taxes recognizable churches, synagogues, mosques, etc. This amounts to hundreds of millions of dollars of a direct subsidy by state and federal taxpayers to those who belong to certain religions. In addition, members of a recognized religion, or for that matter, non-members, can give contributions to a qualified religion and have a direct deduction against their income tax and the church does not have to report that money as taxable income. This is another form of direct subsidy of millions of dollars to organized religion. We do the same for non-religious eleemosynary organizations, qualified organizations, and foundations. We taxpayers subsidize outright individuals and

business entities for profit. We do this through the form of tax breaks, tax subsidies, outright grants, government loans at low interest rates, or government loans at no interest to enterprise zones, and tax increment financing. In addition, we taxpayers subsidize areas and the people living in those areas, who qualify for state and federal relief due to calamities, such as, fire, flood, drought, hurricanes, earthquakes, cyclones, etc. if you are a taxpayer not living in that area, you do not get the relief. If you are a taxpayer living within that area, you get the relief at the expense of other taxpayers.

State and federal governments subsidize townships, villages, school districts, cities, counties, and, at times, the federal government subsidizes states. We have the power, the ability, and the legal right to subsidize present day Indian reservations within the normal framework of how we treat other entities. Do we have the will?

Respondent wants a limited immunity to lawsuits to protect tribal assets. We do that now without calling the protected entity a reservation. In this state, townships, municipalities, local governments, etc., enjoy a limited form of immunity. We call it official and/or discretionary immunity. It has been around for decades. At times different states have considered and put monetary caps on the dollar amount that can be recovered from a municipality in a tort lawsuit. This privilege can be afforded to wealthy municipalities, when individuals, even poor ones; have no such protection. There is nothing that Indian people are entitled to as human beings that cannot be afforded them through the normal process of accepting them as brother and sister citizens. We ought to, they are.

Self-Determination. IV.

Part of respondent's argument is that we need sovereignty to preserve economic self-determination and economic self-governance for tribes. I agree with that goal. But it can be done completely under the framework of present Minnesota law. For instance, municipalities have for decades been able to own and operate municipal liquor stores. Municipalities, for approximately the last 20 years, have been urged, encouraged, and pushed hard by professional sport franchises to build, own, and operate stadiums suitable for professional football, hockey, baseball, and basketball. When municipalities and cities own professional stadiums and ball parks, the taxpayers subsidize wealthy investors (mostly white males) in return for the promise of jobs and economic activity, such as bars, restaurants, and convention centers, in the hopes that tourists going through will spend two days rather than two hours in town. I do not think there is anything intrinsically evil about this. Whatever duly elected officials do, they do. I merely point this out to prove that we have the power, the right, and the precedent to allow Indian economic enterprises such as gambling casinos and other businesses to operate within the framework of existing state and federal law. Do we have the will?

If the taxpayers are asked, in various cities in various states, as they have been, to subsidize wealthy non-Indian investors, it cannot be said that it would be inappropriate for Indian casinos to continue to exist without the mirage that the land they sit on is "sovereign." Casinos provide exactly the same benefits that sports franchises claim they provide, i.e., jobs, economic development, and tourists who go slow rather than fast through the state.

This country has the power, the ability, and the will, to subsidize the wealthy, the poor, and the in-between. Farm subsidies are but one of many examples. It has been known for many years that a majority of the farm subsidies go to a small percentage of the larger, and thus, probably wealthier farmers in the areas of wheat, corn, sugar, tobacco, cotton, and peanuts. This opinion does not knock that concept and does not infer that this practice should be abolished. That is a decision for the will of Congress. I simply point out that we already have, and have had for decades, a legal framework to help people who need help (and some that don't) at the expense of the rest of us. There is nothing keeping us from, again within the framework of how we treat all citizens, calling Indian reservations economic enterprise, business, or disaster zones (I suggest "disaster zones" would be poetic justice). We can extend to reservations the same tax subsidies, outright grants, low interest loans, or zero interest loans, etc., that we now give to others. Our ability to subsidize American citizens and entities, regardless of color, does not stop there. We give, through the Internal Revenue Code, hundreds of millions to billions of dollars of tax breaks to national and multi-national corporations, particularly for mineral exploration (depletion allowance) and overseas investment and trade. Put another way, why do we have to go through the pretense of calling Indians and Indian tribes wards of the government and "sovereign" entities to help them exist?

If the question arises, can we protect their unique way of life if we bring them under the same big tent that the rest of us live under? The unqualified answer is yes. We already do. For example, the lifestyle, culture, and religion/spirituality of the old Order Amish is as specific, as culturally unique, and as different from mainstream America as any traditional Indian community, whether Ojibwe, Sioux, Cherokee, Navajo, Zuni,

or Hopi. Old Order Amish in Minnesota, and in other states, live a lifestyle circa 1840-1880. Horse-drawn equipment, no electricity, kerosene lamps, lack of plumbing, a unique style of dress, and adherence to precepts that the elders of each community set are their way of life. The Amish in Minnesota are normal, full Minnesota citizens. They are normal, full U.S. citizens. They pay taxes on their land; they are entitled to go to public schools (they simply choose not to use them, but instead, maintain their own grade schools); they are entitled to vote in all elections; and they are entitled to run for public office (but choose not to). It is clear that in all ways they live a lifestyle as foreign to the rest of us, and as culturally specific a way of life, as found on reservations in this country where tradition, ceremonies and beliefs go back hundreds of years. Yet we are able to protect them.

Despite these vast cultural differences, this state, this country bends over backward to accommodate the Amish. We do not call them wards of the government. We do not call them a dependent nation. It would be laughable to suggest that they are sovereign or quasi-sovereign. They are just as standard a citizen as those residing in Rochester, St. Cloud, Bemidji, or Hibbing, Minnesota. But we do accommodate their way of life. To protect their way of life, the United States Supreme Court exempted the Amish from the normal requirement applicable to the rest of us that we attend public or private grade schools and high schools until an arbitrary age, often sixteen. Wisconsin v. Yoder, 406 U.S. 205, 234, 92 S. Ct. 1526, 1542 (1972). In creating this exemption, the Supreme Court noted that

> [t]he purpose and effect of such an exemption [is] * * * to allow the Amish their centuries-old religious society, here long before the advent of any

> compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose.

Id. at 234 n.22, 92 S. Ct. at 1542-43 n.22. Thus, the Amish are allowed to attend entirely unregulated home schools from the first through eighth grades. This is the United States Supreme Court speaking.

The Minnesota Supreme Court in State v. Hershberger specifically exempted the Amish in Minnesota from the normal requirement applicable to the rest of us that orange triangles adorn the back of their horse-drawn buggies and farm carts to signify a slow moving vehicle. See State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990) (statue requiring display of slow-moving vehicle emblem violated freedom of conscience rights protected by Minnesota Constitution when statute was applied to Amish defendants, who held sincere religious belief against use of emblem, where state failed to demonstrate that both freedom of conscience and public safety could not be achieved through alternative means of Amish defendants' use of white reflective tape and lighted red lantern).

I state the above simply to point out that this state, this country, has the power and the legal right to protect any and all parts of Indian identity, culture, tribal assets, self-determination, religion/spirituality that needs to be protected, and yet do it all within the framework of treating American Indians like we treat ourselves, as normal citizens of this state, of this country. The real issue is, do we have the will?

V. Duality v. Acceptance.

The heart of the issue, to me, is that we have refused the painful, begrudging acceptance that "we are Indians, Indians

are us," as we have had to accept, with painful, begrudging acceptance, the not-to-be-denied idea that we are African-Americans and Asian-Americans, and African-Americans and Asian-Americans are us.

From the moment the Mayflower dropped anchor, until this very date, we have persisted in a dual America. One America for the American Indian, the red race, and a separate America for the Indo-European Caucasian, the Afro-American, the Asian-American, the white, black and yellow race.

We should have learned by now that this duality in America is so intrinsically evil, so intrinsically wrong, so intrinsically doomed for failure, that we must grit our teeth and work through it.

Examples of failure abound. For a brief time following the outbreak of World War II, we had a dual America, one for the rest of us and one for the Japanese-Americans living on or near the west coast. All of the rest of us, and Japanese-Americans in the central and eastern part of the United States, could move and live at will. Japanese-Americans living in the west coast area could move or live at will, as long as they moved or lived in Japanese relocation camps. This was done with the full pomp and circumstance and authority of the U.S. government, backed by the full judicial authority of the U.S. Supreme Court. After a mercifully few short years, this practice was discontinued. Fifty years later, the U.S. government said that the practice was wrong and Congress appropriated a sum of money to identifiable descendants of those camps. Was this Asian American duality in the U.S. wrong? I can only state that when our government, with its propensity to stonewall, with its tradition of announcing that winners of a war can be guilty of no wrong, just the loser, announces that it did wrong, that it is sorry, and pays money,

well, America, we were wrong. At rest now, is acceptance of the fact that a dual America for west coast Japanese-Americans and the rest of us was wrong.

In our history, we had another, much longer dual America. For approximately 90 years we had one America for white citizens and a second America for black citizens. Following the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution were quickly enacted. As a result, all white citizens and all blacks now became "full" citizens. Yet for approximately 90 years, this country officially sanctioned and officially practiced segregation. We had decades of black apartheid. Even 30 years after the enactment of those three amendments, the United States Supreme Court in Plessy held that, at least as to intrastate travel, separate but equal was still constitutionally permissible, proper, and in all things legal. Plessy, 163 U.S. at 551, 16 S. Ct at 1143. My previous reference to Judge Harlan, the lone dissenter, calls for a further examination of that case (supreme law of the land for the following 58 years). Harlan's dissent said in places:

> But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights of which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States.
>
> * * * *
>
> It was said in argument that the statute of Louisiana does not discriminate against either race,

> but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

Id. at 554-57, 16 S. Ct. at 1145 (emphasis added).

I can only hope that Justice Harlan's candor as to black/white duality will be recognized for its inherent truth and applied to our present duality where our white, African-American and Asian-American citizens on the one side enjoy the U.S., while on the other, and the bottom side, we have the American Indian.

Justice Harlan further said:

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Id. at 559, 16 S. Ct. at 1146.

Until we accept the truth, the truth being that we impose this duality today on American Indians, The Pledge of Allegiance, which is supposed to read

> I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all; (Emphasis added.)

instead reads

> I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, divisible into two classes of colors, one class is black, white, yellow, and the second class is red, with liberty and justice for all according to the above duality.

Between Plessy v. Ferguson in 1896, and Brown v. Board of Education in 1954, the United States continued to have its own form of a dual America, with our own form of black apartheid. Jim Crow laws were alive and well, openly in parts of this country (and subliminally in parts of others) through the tens, the twenties, the thirties, and the forties. It wasn't until approximately 80 years after the Thirteenth, Fourteenth, and Fifteenth Amendments were enacted that President Harry Truman, by executive proclamation, officially integrated the U.S. armed forces. The legally permissible principle of separate but equal, an undeniable form of black apartheid, persisted until 1954 and Brown v. Board of Education. At that time, the federal judiciary had a perfectly readable and articulate precedent called Plessy v. Ferguson to follow. It would have been easy to build on the underpinnings of Plessy.

Plessy indicated that as long as there was equal but separate accommodations for white and colored, and as long as nobody could be denied a berth in one or the other, states could opt to do it.

Basically, Brown v. Board of Education was carved out of whole cloth. Despite precedent, the U.S. Supreme Court said in 1954 (inventing new law), "We just aren't going to do this any more. It is wrong. It was wrong. We don't care that we used to say it was okay. It is not okay. We are going to change it."

There was an immediate hue and cry from many members of Congress and from many states decrying this as a violation of "state's rights". Congressional action to overturn the case was discussed by a few; many legislative assemblies and state houses said "never" and set about various schemes and artifices to negate the ruling. But whether the Oval Office liked it or not, the executive branch of the government set in force the needed justice department and military machinery to implement the dictates of Brown. The struggle was long, violent, and marked by bloodshed and death for the next decade, and finally, in the 1960s, civil rights and voting rights legislation put an end to the thought, held by a few, that although government and courts might say no to duality between Americans of a different color, devious ways could be devised to perpetuate the practice. We just do not allow that any more!

We have the power and the right to end the present system of red apartheid in this country, of wardship and of dependency, all cloaked in the myth of sovereignty. But, do we have the will?

Morton v. Mancari attempts to sidestep the bitter truth that Indian sovereignty is a race-based classification by stating that it is not race based, but is rather a "politically based

difference."[1] 417 U.S. 535, 553 n. 24, 94 S. Ct 2474, 2484 n. 24 (1974) (stating that preferences for American Indians are not racial but political when the preferences apply to members of federally recognized tribes).

Today, I still conclude the result reached in Red Lake School District was just and equitable. The entire school district was within the Red Lake Ojibwe reservation and the entire student body were residents of the reservation. But I no longer accept that part of the reasoning wherein Morton held that Indians are a political class, not a race or an ethnic class. If that were the case, those in Congress who were bitterly opposed to Brown v. Board of Education would have thought of the simple expedient of calling black Americans a political class, rather than a race-based class, and merrily continued on their way with de facto segregation. If this country is to meaningful deal with the consuming problem of race and race bias, we have to be smarter than that; we have to be more honest than that.

The Economic Reality of Mystic Lake Casino VI.

Respondent, a corporate defendant in this personal injury lawsuit, urges that allowing appellant to proceed in state district court would interfere with its casino business, interfere with reservation/tribal business, and interfere with its "self-determination." When examined in the light of the economic realities of respondent, this argument is a non-issue.

---

[1] I have cited to Morton v. Mancari myself in Krueth v. Independent Sch. No. 38, Red Lake, when this court held that a preference for Indian Teachers with junior seniority to non-Indian teachers was appropriate under state law. See Krueth v. Independent Sch. No. 38, Red Lake, 496 N.W.2d 829 (Minn. App. 1993), review denied (Minn. Apr. 20, 1993).

Mystic Lake Casino no more needs this preferential treatment than does a Cargill, a Dayton-Hudson, or a 3M.

Mystic Lake Casino is a full-fledged gambling casino grossing hundreds of millions of dollars per year. It took a few years of planning, and millions of dollars to construct. Its marketing plan from day one, and this must be conceded by respondent, or respondent is without candor, was specifically and solely designed to attract thousands of non-Indian visitors per day, thousands of non-Indian visitors per week, and hundreds of thousands of non-Indian visitors per year. Mystic Lake Casino has, to date, been successful in attracting hundreds of thousands of visitors/gamblers from off the Shakopee reservation; visitors from the metro area, visitors from around the entire State of Minnesota, visitors from out of state, and visitors from foreign countries.

Respondent's reservation contains somewhat less than 200 members. Respondent argues it is entitled to limited sovereign immunity because the casino is a "tribal enterprise." To call Mystic Lake, the largest casino in Minnesota and one in size that compares favorably with large casinos in Las Vegas and Atlantic City a "tribal enterprise," is like calling the Mall of America in Bloomington "a smallish Bloomington strip mall." The Mall of America, although available to Bloomington residents, was specifically designed and built with a marketing plan in place to attract shoppers from the entire metro region, the entire State of Minnesota, from all our neighboring states, from virtually the entire country, and from overseas. So, too, was Mystic Lake.

If Mystic Lake were truly a "tribal enterprise," if it had not been designed, built, and specifically marketed to attract hundreds of thousands of non-Indian visitors from around the state, from around the country, it would, with its millions of dollars tied up in a building, gambling machines and fixtures,

go broke in four hours, would be in Chapter 7 bankruptcy in six.

Mystic Lake's size, its scope, and its marketing plan are not accidental. They are intentional, and well done. It is a highly successful business enterprise. But it is decidedly not tribal, not local. To the contrary, it is a business designed not for the use of reservation residents, but instead, designed and marketed for non-Indian users without whose patronage it would fail immediately.

I conclude that the intentional design, size, and marketing plan of respondent constitutes a clear, express waiver of any socalled limited right not to be sued by its patrons in the appropriate Minnesota district court.

Oddly enough, under Public Law 280, if the defendant were an individual resident of respondent, he or she could be sued by appellant. Why does "sovereignty" not protect the individual Indian, a person with dignity and a life, but instead only protects a soulless corporate shell that does not need the protection? Arguably, the individual Indian deserves more protection than respondent corporation.

The cost of a basic Owner's/Landlord's liability insurance policy might be fairly expensive, given the amount of foot traffic. However, this cost is no more a burden than all other Minnesota businesses, great or small, bear.

The sovereignty issue gets muddled worse in tort cases, as we have here, than it does in contract cases, when you study the difference between "sue and be sued" versus "sue and consent to be sued" clauses. When one contracts with an Indian reservation, there is an issue as to whether the tribal constitution and/or bylaws contain a "sue or be sued" clause, which acts an express waiver of sovereign immunity, or whether it contains a "sue and consent to be sued" clause, which does not act as an express waiver. See Rosebud Sioux

Tribe v. A & P Steel, Inc., 874 F. 2d 550, 552 (8th Cir. 1989) ("sue and be sued" clause in tribal corporate charter is an express waiver of sovereign immunity).

First of all, if there is no "sovereignty," the issue is moot. If you sign a contract and don't perform, you can be sued, and then given a chance to explain your actions. But even allowing for the myth of sovereignty, a contract case can be looked at differently. If one contracts with a reservation and assumes its definition of sovereignty, and signs a contract in writing that contains a "sue and consent to be sued" clause in favor of the reservation, when one suffers for that, you have only yourself and your law firm to blame.

That is decidedly not the case in the area of tort law. None of the hundreds of thousands of daily visitors, like appellant, are sat down at the front door, before plugging in their three nickels in search of the elusive "Wild Cherries," and given a written contract with bold face print, not fine print, that spells out clearly and unequivocally the following information:

> You are on an Indian reservation. We claim this is a sovereign enterprise on sovereign land. If you do not understand that, please consult your attorney. By remaining on these premises after you have read this notice, which you will sign at the bottom, you agree to accept our following terms and definitions. We can sue you if we think we have a case. You cannot sue us in state district court if you think you have a case unless we consent to be sued in state district court. We retain the option of forcing you to start your case in our tribal court, and we appoint the judges and make the rules for our tribal court.

> Also, be aware that this casino may or may not be subject to the Americans with Disabilities Act, may or may not be subject to OSHA regulations, may or may not be subject to state and federal laws prohibiting discrimination and harassment in the area of gender, race, color, and creed. We state that we are sovereign and we state that we can decide to abide by the above rules or we can decide not to abide by the above rules, but no one will tell us what to decide because we claim we are sovereign.

The above is an accurate statement of the position taken by Indian casinos around this state and around the country. Some voluntarily conform to the above laws and regulations, some neglect to conform, some conform only in part, but all insist that they, and not an individual state or the federal government, will dictate to which state and federal laws they feel bound. Obviously, Mystic Lake Casino would not insist that every single person coming through the door sit down, read the statement, and then sign it before being allowed to gamble. This would have a tremendously negative impact on the number of people coming to gamble. So none of the visitors, including appellant, have carefully contracted away their right to sue. None have carefully read and accepted respondent's viewpoint on sovereignty.

What is happening here is that appellant becomes the sacrificial lamb for America's 220 years of benign neglect, and intentional neglect (including active warfare at times), of the various Indian tribes that populate, or used to populate, this country. Rather than deal with this duality, this red apartheid as I call it, we pretend there is such a thing as sovereignty, and as compensation for past wrongs, we state that appellant, a

Minnesota citizen, cannot sue a Minnesota corporation in a Minnesota state court for an accident in Minnesota.

The one court that has gotten this issue right to date is the Montana Supreme Court, in Lambert v. Ryozik, 886 P.2d 378 (Mont. 1994). In Lambert, an enrolled member of an Indian tribe brought a personal injury action in Montana state district court against a non-resident motorist for injuries arising out of a car accident that occurred within the boundaries of appellant's tribal reservation. The defendant motorist moved to dismiss the action "for lack of subject matter jurisdiction." The district court dismissed the lawsuit, believing it was guided by precedent that stated the jurisdiction of the tribal court preempted the jurisdiction of the state district court.

The Montana Supreme Court made short shift of the argument and stated flatly that plaintiffs (Montana Indians), as full Montana citizens, had an absolute right under the Montana Constitution to sue non-Indians in Montana state court. The court said that the failure to recognize this right to sue would deprive an Indian plaintiff of due process and equal protection of the law under the Montana Constitution. Id. at 380.

Minnesota bestows a similar constitutional guarantee of the right to have a jury trial in a Minnesota state court. See Minn. Const. art I, § 4 (stating "[t] he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy").

Appellant here, subject all day and all night to being sued in state district court by an individual Indian from Shakopee, or by respondent itself, is being denied that Minnesota constitutional right.

The Lambert court did, in its analysis, recognize a previous case which found in favor of an Indian defendant

who wanted to defend himself in tribal court instead of state court. Lambert, 886 P.2d at 380. That part of the analysis was collateral and unneeded for the its core holding. I suggest the Lambert court simply needed that part of its analysis that recognized the inherent injustice of allowing "sovereignty" to stand in the way of a Montana citizen's right to sue in a Montana court. Applying the Lambert analysis to appellant's rights in this case, the inconsistencies of respondent's position abound. If appellant had negligently hurt a blackjack dealer or a coin changer, that person could sue appellant in state district court. Yet, we say appellant cannot sue respondent in state district court when she was negligently hurt.

Assume that in the parking lot of respondent, appellant, with passengers in her car, collided with a vehicle belonging to the Mystic Lake Casino and being driven by a tribal member. The driver could sue appellant in state district court. The passengers in appellant's vehicle could sue appellant in state district court. Respondent could sue appellant for property damage in state district court. Are we to say that appellant, for her own injuries, has to counterclaim against the driver, and cross-claim against him for injuries her passengers received, in tribal court?! Do we have parallel lawsuits? What if this lawsuit and/or appeal from state district court finds negligence on the part of the driver of the reservation car, but the judgment in tribal court finds negligence on the part of appellant. Whose judgment is higher? Whose judgment gets enforced?

Our case today is founded upon a claim of "sovereignty" which does not now exist, nor has ever existed, in any true sense of the word. Even Cherokee Nation acknowledged the lack of true sovereignty on the part of Indian tribes. Somehow the word crept into our vocabulary. I suspect it

crept in as a pacifier for unrighted wrongs against Indian people, against Indian tribes.

The tribal courts throughout this state, throughout this country, are not a reliable and predictable forum for citizens to sue each other in, nor a place to seek redress and due process. If there is a need to preserve an Indian tribal court system, I have no quarrel. This state, this country, is moving toward an era of alternative forums for dispute resolution. But to wipe out the racial bias our Minnesota Supreme Court declared found in our court system, an Indian tribal court must be open to all, organized pursuant to the Minnesota statutes controlling conciliation courts, district courts and appellate courts, and organized under the auspices and rule of the Minnesota Supreme Court regarding the training and discipline of attorneys and judges.

Anything less would be a pure race-based distinction, and no Minnesotan, regardless of color, not volunteering to enter a court system based on race and take their chances, should be forced to do so or lose their right to sue. But this is precisely what respondent urges on this court. I disagree strongly. It is difficult to sanction a Tribal Court and declare it to have jurisdiction over Minnesotans, both Indian and non-Indian, when the Tribal Court is a pure race-based classification. The appointing authority for the judges of the Tribal Court is the Reservation Business Council, which is, by definition, composed only of those meeting a race-based qualification. This Council may, if they choose, appoint non-Indian judges to the Tribal Court, but they reserve to themselves the right to make appointment to the Tribal Court a race-based classification. In addition, the Reservation Business Council, if respondent's position is accepted, retains the right to sue other races (non-Indian) in Minnesota district court, but then has the power to declare that other races (non-Indian) do not

have the right to sue respondent in Minnesota district court, unless respondent first consents.

How do we accept the incongruity, the injustice, that residents of respondent's reservation, and respondent itself, have the option of exercising their Minnesota constitutional right to sue initially in state district court, but that appellant does not? She is, like they, a Minnesotan resident.

The truly important goals of protecting Indian culture, Indian spirituality, self-determination, their freedom, and their way of life can be done within the same framework and the same system, by which we treat all other Minnesotans of all colors. This country has failed miserably at maintaining dual Americas. At one time, we maintained one America for white and one for certain Japanese-Americans. At another longer time, we maintained one America for white Americans and another America for black Americans.

For some reason, we continue to insist that American Indians can be the last holdout, a race that is not entitled to be brought into the fold, can be left to shift for themselves as long as, from time to time, we pat them on the head like little children and call them sovereign. "Sovereignty" is just one more indignity, one more outright lie, that we continue to foist on American citizens, the American Indian.

Like Justice Harlan, the dissenter in Plessy, I am out of excuses and simply can no longer defend the status quo.

The most attractive and compelling argument made by respondent is that they need this sovereignty for Indian "self-determination" and Indian "self-governance." When we read and hear this phrase, all of us, like myself, who push for the self-determination and independence of all, particularly the poor and the formerly poor, would think it to be a great argument and reason enough to continue the myth of sovereignty. That is, unless we look into the very phrase

itself and say, "Self-determination for whom? Don't all residents of this state already have it to the same degree as all others? Are not members of respondent's tribe residents of this state?"

All bona fide residents of Minnesota, of all races and colors, enjoy identical opportunities for self-determination and self-governance. All of us enjoy the same access to public schools. All of us of voting age enjoy the same access to the polls. All of us of electable age and with no legal disability enjoy the same opportunity to run for office. None of us can be denied an opportunity to apply for a job, or be kicked off a job, if we have one, purely because of race or color. Those same guarantees already do, and must, apply (whether you live on a reservation or not) to all American Indians in Minnesota. Minnesota Indians, like the rest of us, are Minnesota citizens.

Why is there this need to single out a class of people by race and give them a "double dose" of self-determination, and self-governance? Without this fiction of sovereignty, they still have every right we possess, every right that the State of Minnesota can give. Are American Indians entitled to "more self-determination" than Minnesota gives to its other residents? I am not sure how this could be. How can a state give more than it possesses?

If this is deemed a federal issue, how does the federal government give more than it possesses? Under the United States Constitution, all citizens of this country of all races already enjoy the same rights and the same access to the federal court system to enforce those rights.

Why does the federal government select one class of people by race and feel it necessary to give them "double self-determination and self-governance. Double in the sense that they have the rights of all U.S. citizens, but now there is

supposed to be another right because they are Indians? Does that make Indians separate but equal? I suggest that Brown v. Board of Education will tell us this is a bad idea, a vicious and humiliating idea.

Do we label Indians "separate but more equal?" That would not personally bother me, as the American Indian is entitled to some pay back for our treatment of them since this country was founded. But, can we really single out a class of Americans by race and deem them separate but more equal, without running into the same vicious firestorm of hate and divisiveness that prompted the Brown Supreme Court to state that the Plessy Supreme Court was all wet, all wrong, and cry out, "we aren't going to do that any more."

Do we label Indians "separate but less equal?" I suggest that one will not get off the ground if "separate but equal" cannot.

This case, this issue, is not about who can round up the most dried out musty federal precedent[2] for one side or the other. This case, this issue, is about the future of the United States, and the future of the American Indian. This case is about whether we accept the American Indian as a full U.S. citizen, a real American, or whether we will continue to sanctify tiny enclaves within a state and tell the individual Indian that if he or she stays there and does not come out and live with the rest of us, we will bless them with the gift of "sovereignty."

---

[2] It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Path of the Law, 10 **Harv. L.R.** 457, 469 (1897).

In all honesty, I am satisfied that respondent, respondent's attorneys, and members of respondent's reservation realize and accept that they are full-blown Minnesota residents, full-blown U.S. citizens, and are not really a true sovereign nation or country in any real sense of the word. I know they know that, and I know they accept that because they continuously demand and exercise all the rights and privileges of being Minnesotans and Americans. They vote, they run for public office. The Minnesota Legislature's state senator from Senate District 4, is and has been, an enrolled member of the Leech Lake Ojibwe Reservation and a resident thereof for years. He repeatedly has signed affidavits of candidacy for the Minnesota Senate declaring himself to be of age, to be a Minnesota resident, and to be a resident of the senatorial district from which he files. That district includes both the Leech Lake reservation and non-Indian lands. The Minnesota Legislature at all times holds out to all residents in Senate District 4 that they are bona fide citizens of the State of Minnesota. At no time does the Minnesota Legislature advise Minnesotans living in Senate District 4 that part of that district is foreign or sovereign country, nor does the Minnesota Legislature advise residents of Senate District 4 that they may be governed by a foreign national of a sovereign nation.

The senator from the Leech Lake Reservation is a full Minnesotan, and is completely qualified and completely eligible to run for his senate district and all other local and state offices. All other Minnesota Indians in this state enjoy identical qualifications and eligibility to run for public office, from local right on up through the president of the United States.

In addition to being eligible to serve in the Minnesota Senate and the Minnesota House of Representatives,

Minnesota Indians are fully eligible and, if qualified, to file for or be appointed to any of Minnesota's constitutional offices, including state and appellate court judicial positions. Further, they are eligible to run for one of Minnesota's eight seats in the United States House of Representatives, or our two statewide United States senatorial positions. I can only note that membership in the Minnesota legislature, the Minnesota judiciary, the Minnesota delegation in Congress, the federal bench, the United States Supreme Court, and the office of President of the United States, is not often extended to foreign nationals of true sovereign nations.

Respondent, and its members, routinely exercise their rights of access, as Minnesotans, to Minnesota district courts and Minnesota federal district courts. They take advantage of the option of sending their children to the public schools of Minnesota. They lobby the Minnesota legislature and raise money (legitimately) for PACS to promote their own self-interest, and in all other things enjoy the same rights and privileges open to Minnesota residents and Minnesota businesses, regardless of race or color.

What respondent's attorneys are really after is a race-based economic preference that other races in Minnesota do not have. I do not quarrel with their right to be here on appeal. Ethical attorneys are required to support their client's cause, and when stuck with the facts and stuck with the law, they have no choice but to put their client's best foot forward. Here, that means cloaking their client's request for a race-based economic preference in the historical myth of "Indian sovereignty."

I hope I have been able to set out in this opinion that history, not myself, has marshaled the most compelling argument possible that Indian sovereignty never existed and does not now exist. If the only issue were an argument that

perhaps out of all the different races in Minnesota, if any one could justify being singled out for preferential treatment, it would be the American Indian, I would have written a whole different opinion. History would marshal the argument, "Hey, America, its pay back time." But that is not the issue, as it cannot be, as pure race-based distinctions are an area this country has done so poorly in, we put them aside for fear of divisive and hate-filled bias resurgence. The issue is, instead, "can we do what needs to be done for Indian tribes and for individual members, and can we do it legally?" The answer is a simple unqualified "yes."

As I have set out in this dissent, the machinery is in place on the state and federal levels, and has been so for decades, for hundreds of years, to treat all we citizens, all we Americans, subject to the reality of our limited resources, with all the care, respect, and compassion that we can give. Other than that, we cannot do, as no state, no country can give what it does not possess.

If we follow respondent's reasoning, it, as a reservation, is entitled to be a private, sanctified enclave with the extraordinary privilege of not having to answer for its alleged acts of negligence in a Minnesota district court. I am simply not persuaded.

How many private enclaves within this state, within this country, do we want to establish before we realize we are Balkanizing America? At last count there were 500 to 600 federally recognized tribes. That begs the question of why should a white government get to designate who can be a real Indian tribe and who cannot be. Anthropologists, linguists, and serious students of Indian culture conclude there may be as many as 2000 different distinct groups of Indian people, some small and some larger, with a separate and identifiable culture, way of life, or language. The lower number of 500 to

600 is expanding with the push for economic development, with or without gambling, as unrecognized bands or tribes are petitioning the federal government for recognition as yet another "sovereign nation."

Whether we have 500 to 600 (and growing) federally recognized tribes, or 2000 or more (and growing) distinct tribes, we should talk to Yugoslavia about Balkanization. Yugoslavia no longer exists.

This is not a case of finding room for the great waves of European immigrants that this country experienced between roughly 1800 and 1920. Everyone involved in this issue is already here! The one race or tribe or ethnicity that does not immigrate to America, by definition, is the American Indian.

We simply need to provide for these fellow citizens, who have been with us always, and with us a lot longer than we have been with them, and treat and respect them with the laws already on the books for the class of people we call "Minnesota Americans."

Respondent in this case, a defendant in a personal injury case, is a multi-million dollar casino with millions of dollars in revenues and millions of visitors over its short lifetime. Respondent was designed specifically for, and marketed specifically to non-Indian visitors from outside the reservation. That has to be the clearest economically based express waiver of any claim of immunity that I could design, if asked to be the architect of such a waiver.

I respectfully dissent for all of the above reasons, and would remand this case to the appropriate Minnesota district court to continue. It would be Minnesotan against Minnesotan, in a court trained to handle such matters. No harm will be done.

R.A. Randall
February 7, 1996

STATE OF MINNESOTA

IN SUPREME COURT

C0-95-133
555 N.W.2d 284 (Minn. 1996)
Petition for Certiorari pending,
(No. 96-1215, docketed January 30, 1997)

Gardebring, J.
Court of Appeals Dissenting, Keith, C.J. and Coyne, J.

Jill Gavle, petitioner,
Appellant,

Filed: October 31, 1996
vs. Office of Appellate Courts

Little Six, Inc., a foreign
corporation
d/b/a Mystic Lake Casino, et al.,
Respondents.

SYLLABUS

1. Although jurisdiction may be concurrent with that of a tribal court, state courts have subject matter jurisdiction over a cause of action involving a tribal-owned corporation and a nonmember when the alleged acts from which the cause of action arose occurred both within and outside of Indian country.

2. The affirmative defense of sovereign immunity may be extended from a tribe to a tribal business entity, if the business entity is organized for a governmental purpose and closely linked to the tribe and if the extension of immunity furthers federal policies intended to promote tribal autonomy.

3. Absent an express and unequivocal waiver of sovereign immunity, a tribal business entity possessing the affirmative defense shall not be deemed to have waived it. Registration with the Secretary of State as a foreign corporation is not such a waiver.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case is a tort action filed by appellant Jill Gavle against Little Six, Inc. (LSI) and three of its officers. The suit alleged several tortious acts, including sexual harassment, pregnancy and racial discrimination, civil rights violations and other torts, arising from her employment with LSI. The trial court granted LSI's motion for summary judgment, holding that sovereign immunity barred Gavle's claims against LSI. The court of appeals affirmed, concluding that the trial court had both subject matter and personal jurisdiction over LSI, but agreeing with the trial court that sovereign immunity was a bar to the suit. We affirm on the basis that, while state courts may have concurrent jurisdiction with tribal courts in civil matters arising both in and outside of Indian country, the sovereign

immunity of the Shakopee Mdewakanton Sioux (Dakota) Community extends to LSI and is a bar to this suit in state court.

The Shakopee Mdewakanton Sioux (Dakota) Community (the Community) is a federally recognized Indian tribe. LSI, a tribal business entity incorporated under the Community corporate ordinance in 1991, has issued one share of stock owned by all voting members of the Community. LSI is registered with the state of Minnesota as a foreign corporation transacting business within the state. LSI owns a gambling casino which is in Mdewakanton Indian Country. [1]

The Community has, through the corporate ordinance, granted certain privileges and protections to LSI:

> 4.11 A Corporation wholly owned by the Community may assume any or all of the Community's fights, privileges and immunities (including, without limitation, sovereign immunity) concerning federal, state or local * * * jurisdiction to the same extent that the Community would have such fights, privileges, and immunities if it engaged in the activities undertaken by the Corporation.
>
> 4.12 A corporation wholly owned by the Community, shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Community, and other courts of competent jurisdiction * * *.

Shakopee Mdewakanton Sioux Community Corporation Ordinance §§ 4.11, 4.12 (amended, July 27, 1994). In turn, LSI's articles of incorporation set out the purpose of the corporation and limit both the reach of immunity extended by

the Community and the extent of the corporation's ability to consent to be sued:

> 3.0 Purposes and Powers. The purposes for which the Corporation is organized are to engage in any lawful act or activity * * * [which seeks] to improve the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community.
>
> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state and local * * * jurisdiction, and sovereign immunity from suit * * *. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; * * *. Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Community."

Articles of Incorporation of Little Six, Inc. §§ 3.0, 3.1, 3.2 (Mar. 18, 1991) (hereinafter Articles of Incorporation).

LSI employed Gavle as a security guard from March 1992 to January 1993. Her job included duties at the casino (in Indian

Country) and at LSI's temporary administrative offices at the Canterbury Downs complex in Shakopee, Minnesota. While Gavle's complaint details many incidents, alleged to be tortious, that occurred at the casino, it also contends that some of the allegedly tortious acts took place away from the casino, in or near Shakopee. [2]

At the heart of this case is the issue of whether tribal business entities are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts--jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit. Further, there are instances when a state or federal court may have jurisdiction over a matter involving a tribe or tribal entity, but may choose to stay its action, deferring to the concurrent jurisdiction of a tribal court. Thus, we must consider four related yet discrete issues:

a. Do Minnesota courts have jurisdiction over a tribal business entity in a civil tort matter involving actions occurring both within and outside of Indian country?

b. If Minnesota courts have such jurisdiction, must they stay their exercise of that jurisdiction in consideration of concurrent tribal court jurisdiction, under the doctrine of "infringement"?

c. If Minnesota courts have such jurisdiction and choose to exercise it, is such a suit nevertheless barred by tribal sovereign immunity?

d. If sovereign immunity would otherwise be available in this case, has it been waived by LSI's registration with Minnesota's Secretary of State as a foreign corporation?

Historical Background

To provide context for our discussion of these complex issues, we begin with some discussion of the historical relationship of Indian tribes to the state and federal governments. There are over 500 federally recognized tribes in the United States. David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., Cases and Materials on Federal Indian Law 4 (3rd ed. 1993). Felix S. Cohen's commentary best describes the historical relationship between the United States and Indian tribes:

> Indian policy is marked by idealistic periods such as the first years of the Republic, when Congress pledged that 'the utmost good faith shall always be observed toward the Indian,' and the 1930's, when a commitment was made to revive tribal governments. Other eras were less altruistic: the period of removal, when hundreds of tribes were evicted forcibly from their ancestral lands; the allotment era, which resulted in the loss of ninety million acres of tribal lands; and the termination period, when more than one hundred tribes were stripped of the federal-tribal relationship and, in most cases, of their land.

Felix S. Cohen, Handbook of Federal Indian Law 49 (1982 ed.) (hereafter Cohen, Federal Indian Law).

In general, the federal government has viewed the Native American more as a "political entity" than as a racial minority. [3] Thus, until 1871 the United States recognized Indian tribes as possessed of the attributes of nationhood and, accordingly, concluded treaty agreements with them. Cherokee Nation v. Hitchcock, 187 U.S. 294, 305-06 (1902). For over one hundred years however, this country has systematically brought the various Indian tribes under the auspices of the federal government as "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). In exchange for ceded land, the federal government gave Indian tribes special status that only Congress may remove. Indian tribes are not states; nevertheless, they possess a kind of sovereignty superior to that of states but inferior to that of the federal government. Stephens v. Cherokee Nation, 174 U.S. 445, 484-86 (1899); see Colliflower v. Garland, 342 F.2d 369, 374-76 (9th Cir. 1965). They are "subordinate and dependent nations possessed of all powers as such" and limited only "to the extent that they have expressly been required to surrender [their powers] by the superior sovereign, the United States." Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959). Thus federally recognized tribes hold certain powers and privileges allowed other sovereigns; jurisdiction over certain judicial matters and sovereign immunity are two such characteristics.

Jurisdiction

Judicial jurisdiction over matters involving Indians or Indian tribes is a function both of territory--where the matters arise--and of subject matter--what the nature of the claim is. "A court's jurisdiction may depend not only on the location of

events but also on the race of the parties or the subject matter of the case." Cohen, Federal Indian Law, supra, at 281. Given the pervasive sweep of federal law in Indian matters and the deference to Indian sovereignty within that law, jurisdiction of state courts over both civil and criminal matters involving Indians is governed by federal statute or case law. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), the U.S. Supreme Court held that, absent federal action, Indian tribes are not subject to the jurisdiction asserted over them by a state. The Court reaffirmed this holding over 100 years later in Bryan v. Itasca County Minnesota, 426 U.S. 373, 392 (1976) (quoting Oklahoma Tax Commission v. United States, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)), when it said: "Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate * * * immunity and allow states to treat Indians as part of the general community." Thus, absent a grant of federal authority, state courts have no jurisdiction over Indians, Indian tribes or other Indian entities. See, e.g., National Farmers Union Ins. Co. v. Crow Tribe of Indians of Montana, 471 U.S. 845, 855-56 (1985); Fisher v. District Court of the Sixteenth Judicial Dist. of Montana, 424 U.S. 382, 387 (1976); Williams v. Lee, 358 U.S. 217, 220 (1959); United States v. Kagama, 118 U.S. 375, 384 (1886).

In some states, including Minnesota, Congress has provided for state court criminal jurisdiction for matters occurring within Indian country, 18 U.S.C. § 1162 (1994), and for civil jurisdiction in actions to which Indians are parties. 28 U.S.C. § 1360 (1994). However, the reach of congressionally authorized state court jurisdiction provided in so-called Public

Law 280 [4] states does not extend to tribes or tribal entities. See Bryan, 426 U.S. at 389.

Jurisdiction over federally recognized tribes themselves, or tribal entities, is governed by federal case law. The U.S. Supreme Court has determined that state court jurisdiction over tribal activities that took place within Indian country would undermine the congressional aim of encouraging self-government and self-determination by the dependent tribes and "infringe on the right of the Indians to govern themselves." Williams, 358 U.S. at 223. However, the Court found no such infringement where the tribal activities took place off the reservation. Specifically, the Court has said "[a]bsent express federal law to the contrary, [Indian business entities] going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). In those circumstances, the Court has held that state courts may have jurisdiction to hear the cause of action.

This case is, of course, complicated by the fact that some of the alleged tortious acts took place within Indian country, while others did not. Since controlling federal common law turns largely on the location of the alleged tortious activity, it provides no clear guidance as to which court system may assert jurisdiction. Because this case involves non-Indian individuals and Indian tribal business entities and because it involves acts occurring both within Indian country and outside, it may be one of those cases where "'both the tribe and the State could fairly claim an interest in asserting [our] respective jurisdictions.'" Duluth Lumber and Plywood Co. v. Delta Development, 281 N.W.2d 377, 382 n. 3 (Minn. 1979)

(quoting McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 179 (1973)).

Thus, in some respects, this jurisdictional puzzle is best considered as an issue of concurrent jurisdiction. Concurrent jurisdiction describes a situation where two or more tribunals are authorized to hear and dispose of a matter and the choice of which tribunal is up to the person bringing the matter to court. Black's Law Dictionary 291 (6th ed. 1990). Such a jurisdictional overlap is common between the federal and state courts as both courts are empowered to hear certain claims, such as those arising under 42 U.S.C. § 1983 (1994), Allen v. McCurry, 449 U.S. 90, 99-100 (1980), or the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (1994), Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 697 (Minn. 1985), cert. denied, 476 N.W.2d 1130 (1986). Concurrent jurisdiction conflicts are not limited to the courts of two sovereigns. Indeed, this court has held that the various district courts across the state operate as independent tribunals and, thus, have concurrent jurisdiction. State, ex rel. Minnesota Nat. Bank of Duluth v. District Court, Fourth Judicial District, et al., 195 Minn. 169, 173, 262 N.W 155, 157 (1935).

When a concurrent jurisdiction problem arises, the proceedings of one court will usually be stayed or dismissed, often through the use of the abstention doctrine. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 806, reh'g denied, 426 U.S. 912 (1976). Abstention is a "narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Id. at 813. It is appropriate only in limited circumstances, when continuing federal proceedings would be improper or moot, given the

anticipated outcome of state proceedings. Id. at 814-16. Generally, however, comity between courts will resolve instances "[w]here two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction * * * may dispose of the whole controversy * * *." Minnesota National Bank of Duluth, 195 Minn. at 173, 262 N.W at 157. Although, unlike some concurrent jurisdiction cases, there are not two competing lawsuits here--one in tribal court and one in state court--we think that concept provides a useful framework for discussion.

In this matter, we find no federal prohibition on state court consideration of civil claims arising out of the acts of Indian business entities occurring outside of Indian country. Further, we believe Gavle would ordinarily be expected to try all her claims in one judicial proceeding; that is, it would be highly inappropriate to allow her to proceed against LSI in two judicial fora, with some allegations of tortious conduct arising within Indian country to be considered in tribal court and those arising outside to be considered in state court. Thus, we conclude that state courts have jurisdiction of Gavle's claims, including those arising within Indian country (although, of course, tribal courts, may have jurisdiction, as well). [5]

However, as in cases involving concurrent jurisdiction, instances of jurisdictional disputes between tribal and state courts also raise the question of whether that jurisdiction should be exercised. The abstention doctrine and the "first to file" rule are not truly rules at all, but principles, a "blend of courtesy and expediency." Medtronic, Inc. v. Catalyst Research Corp., 518 F. Supp. 946, 955 (D.Minn. 1981), aff'd,

664 F.2d 660 (8th Cir. 1981). These "principles" "should be applied in a manner serving sound judicial administration." Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985). In Indian law matters, the related concept is identified as "infringement," which brings us to our next issue.

Infringement

As LSI notes, the governing federal principle in determining whether a court should exercise concurrent jurisdiction of the kind present here is one of deference. See, e.g., McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 175 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Duluth Lumber and Plywood Co. v. Delta Development, 281 N.W.2d 377, 382 (Minn. 1979). The doctrine at work is referred to both as "infringement" and as "preemption."

The Supreme Court views preemption as an additional means of protecting Indian sovereignty. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). The Court held that preemption "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state * * * and tribal interests at stake * * * to determine whether * * * the exercise of state authority would violate federal law." Id. at 145. Further, the Supreme Court, in Williams v. Lee, held that the general rule is that the exercise of state court jurisdiction must not "undermine the authority of the tribal courts over Reservation affairs" nor "infringe on the right of Indians to govern themselves." 358 U.S. 217, 223 (1959). The Iowa Supreme Court, considering a similar question, said "[i]f the state interest is greater and does not encroach on Native

American interests, the state may act." Meier v. Sac and Fox Indian Tribe of the Mississippi in Iowa, 476 N.W.2d 61, 64 (Iowa 1991).

The Court expanded upon this principle in two cases, National Farmers Union Ins. Co. v. Crow Tribe of Indians, and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). LaPlante involved the question of whether a federal court should "stay its hand" in order to allow a tribal court a "full opportunity to determine its own jurisdiction." LaPlante, 480 U.S. at 16 (quoting National Farmers Union, 471 U.S. at 857). In National Farmers Union, the Court held that exhaustion of tribal court remedies allowed the tribal court the opportunity to explain why it took jurisdiction and allowed other courts the opportunity to benefit from the tribal court's "expertise in such matters * * *." National Farmers Union, 471 U.S. at 857. The LaPlante court held that no state court jurisdiction could "interfere with tribal sovereignty and self-government" of a tribe as a "matter of federal law." LaPlante, 480 U.S. at 15. However, the Court went on to state that " [e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." Id. at 16 n.8.

The Supreme Court's reasoning in many of the infringement cases turns upon the vital role that tribal courts play in tribal self-government, especially where the question to be considered is, in the first instance, the jurisdictional limits of the tribal courts themselves. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332-333 (1983); United States v. Wheeler, 435 U.S. 313, 332 (1978). However, the infringement doctrine has also been considered in contexts other than questions of the tribal court's jurisdiction. For example, the question of the validity of certain claims alleged

to arise under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1994), has been held to require exhaustion of tribal court remedies before a federal district court will take jurisdiction. Prescott v. Little Six, Inc., 897 F.Supp. 1217, 1224 (D. Minn. 1995); see also Reservation Telephone Cooperative v. Three Affiliated Tribes of Fort Berthold Reservation, 76 F.3d 181 (8th Cir. 1996) (validity of tribal taxation of telephone lines and rights-of-way); Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995), reh'g denied (May 23, 1995) (validity of tribal taxation of coal mining "source gains").

It should also be noted that the application of the infringement doctrine occurs largely in federal court. There are few instances of a state court deferring to the jurisdiction of a tribal court, where they shared concurrent jurisdiction. Further, we have found few cases in which a state court has been asked to require exhaustion of tribal court remedies when the underlying question to be resolved is whether a tribal business entity may assert the tribe's sovereign immunity. See, e.g., Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988), cert. denied, Pueblo of Acoma v. Padilla, 490 U.S. 1029 (1989); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983); White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971). The opinions in these cases do not address the question of the jurisdiction of the state court to decide the sovereign immunity issue because jurisdiction was, apparently, assumed to exist. Therefore, we are left without controlling precedent or even persuasive case law on the issue of whether a state must defer to the tribal court on the question of whether a tribal business entity may assert the defense of sovereign immunity.

Although the question is a close one, we conclude that the consideration by Minnesota state courts of whether LSI may assert the defense of sovereign immunity does not "undermine the authority of the tribal courts" nor "infringe on the ability of Indian tribes to govern themselves." Williams, 358 U.S. at 223. Minnesota state courts have a strong interest in determining for our citizens the nature of the legal claims that they may assert against tribal business entities and the defenses that may be raised in response. See Myers v. Government Employees Ins. Co., 302 Minn. 359, 366, 225 N.W.2d 238, 243 (1974). Furthermore, contrary to LSI's assertions, we do not seek to change the tribal laws, to reduce the community's ability to govern itself, or to remove the tribal court's jurisdictional claims to actions involving on-reservation activities. Instead, we choose to take jurisdiction only to establish Minnesota law on the issue of sovereign immunity for tribal business entities, in the hope that in so doing, we may avoid future disputes and pave the way to better understanding between the judicial systems.

Sovereign Immunity

Because we have jurisdiction to hear Gavle's claim, and we choose to exercise it, we now address the issue of sovereign immunity. It is settled law that tribes have the privilege of sovereign immunity, granted to them by Congress and existing at the sufferance of Congress. Rice v. Rehner, 463 U.S. 713, 719 (1983). "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development, and cultural autonomy." American Indian Agricultural Credit Consortium,

Inc., v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985) (citations omitted). Sovereign immunity has been successfully asserted as an affirmative defense to suit in federal or state court by tribes and their officers acting within the scope of their authority, and by some tribal entities. See, e.g., United-States v. Kagama, 118 U.S. 375, 383-84 (1886); Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 671 (8th Cir. 1986); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert denied, 467 U.S. 1214 (1984).

The question before us today is whether LSI is the kind of tribal entity, analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether it is more like a commercial business enterprise, instituted solely for the purpose of generating profits for its private owners. Gavle argues that LSI is a mere commercial activity, a corporation organized to generate profits, which happens to have its principal place of business on the reservation and whose owners happen to be Indians. Relying on the Arizona state supreme court decision in Dixon v. Picopa Constr. Co., 160 Ariz. 251, 772 P.2d 1104 (1989), she contends that LSI serves no function akin to that of tribal government and thus cannot benefit from the sovereign immunity possessed by the tribe. Referring to its earlier case of, White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971), which extended sovereign immunity to a tribal owned business entity, the Dixon court held that Picopa Construction Co., a tribal-owned corporation, was not a "subordinate economic organization" and thus did not have sovereign immunity. Dixon, 160 Ariz. at 258, 772 P.2d at 1111.

LSI, in turn, argues that the corporation was organized under the tribal ordinances and empowered with the same rights and privileges as the tribe. LSI points to a number of cases in which courts have extended the reach of a tribe's sovereign immunity to entities that were, in some way, subordinate organizations of the tribe. The Eighth Circuit has, for example, held that immunity existed for a tribal-chartered housing authority. Weeks Construction, 797 F.2d at 671; Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Auth., 395 F. Supp. 23, 28 (D. Minn. 1974), aff'd, 517 F.2d 508 (8th Cir. 1975). The New York Court of Appeals recently found sovereign immunity extended to a non-profit, state-chartered corporation. In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc., 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993, 635 N.Y.S.2d 116, 120 (1995). Finally, the Seventh Circuit Court of Appeals has held that a contract with a wholly-owned tribal corporation, whose manufacturing facility was located within the boundaries of a reservation, was to be treated as a contract with the tribe itself. Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 809-10 (7th Cir. 1993), cert. denied, Sioux Mfg. Corp. v. Altheimer & Gray, 510 U.S. 1019 (1993).

The connection between a tribal housing agency or social service agency and its "parent" tribe is relatively clear. But, the demarcation between those business entities so closely related to tribal governmental interests as to benefit from the tribe's sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear. As noted in a recent federal circuit court opinion, "whether tribal sovereign immunity now extends to commercial activities is an important, complex and unresolved question," which the U.S. Supreme Court has never directly considered. In re Greene v.

Mt. Adams Furniture, 980 F.2d 590, 600-601 (9th Cir. 1992), cert. denied, Richardson v. Mt. Adams Furniture, 510 U.S. 1039 (1994) (Rymer, J., concurring). It may be, as a federal district court in Wisconsin determined in a case with facts closely analogous to the instant case that "'an action against a tribal enterprise is, in essence, an action against the tribe itself.'" Barker v. Menominee Nation Casino, 897 F.Supp. 389, 393 (E.D. Wis. 1995) (quoting Local IV-302 Int'l Woodworkers Union of Am. v. Menominee Tribal Enter., 595 F.Supp. 859, 862 (E.D. Wis. 1984)). In Barker, a tribal gaming commission and casino were found to be immune from suit. 897 F. Supp. at 393. To aid our analysis, we turn to the criteria that courts other than the U.S. Supreme Court have developed in examining similar fact patterns.

In Shelley, the Arizona Supreme Court, in addition to examining the closeness of the connection between the tribe and the business entity, looked to the intended purpose of the business entity. Shelley, 107 Ariz. at 7, 480 P.2d at 657, Applying this standard in the Dixon case, the Arizona court rejected the Picopa Construction Co.'s request for sovereign immunity partly because the business entity at issue was formed "solely for business purposes and without any declared objective of promoting the * * * general tribal or economic development * * *." Dixon, 160 Ariz. at 257, 772 P.2d at 1110. Thus, the announced purpose for which the business entity was formed is a strong factor in determining whether it may benefit from the tribe's sovereign immunity.

In addition to considering the general purpose for which the business entity was formed, the Dixon court also identified the following questions as important factors to determine the extension of sovereign immunity.

1) Was the business entity formed to manage or exploit specific tribal resources?

2) Would the federal policy designed to protect Indian assets and tribal cultural autonomy be furthered by extension of sovereign immunity to the business entity?

Dixon, 160 Ariz. at 257-58, 772 P.2d at 1110-11.

A more detailed approach was recently adopted by the New York Court of Appeals. The court outlined six factors to be considered in determining whether a tribal business entity should be extended the protection of sovereign immunity enjoyed by the tribe itself

1) whether the entity is organized under the tribe's laws or constitution rather than federal law;

2) whether the organization's purposes are similar to or serve those of the tribal government;

3) whether the organization's governing body is comprised mainly of tribal officials;

4) whether the tribe has legal title or ownership of property used by the organization;

5) whether tribal officials exercise control over the administration or accounting activities of the organization; and

6) whether the tribe's governing body has power to dismiss members of the organization's governing body.

In re Ransom, 86 N.Y.2d at 559, 658 N.E.2d at 992, 635 N.Y.S.2d at 119.

Taking into account the reasoning of these cases, we conclude that the principal factors to be considered in determining whether tribal sovereign immunity extends to a tribal business entity are three:

1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;

2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and

3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity

Applying these factors to the facts at hand, we conclude that, as a tribal business entity, organized for the general benefit of the Community and closely linked to the governing structure of the Community, LSI is entitled to sovereign immunity from civil action in state court.

First, we note that LSI was created for the specific purpose of "improv[ing] the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community." Articles of Incorporation, supra, at § 3.0. While Gavle may argue that LSI's economic activity serves no governmental purpose, the U.S. Supreme Court, in California

v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), relied upon the Bureau of Indian Affairs' view that "tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination." Id. at 217-18 n.21 (quoting an affidavit submitted to the court by the Director of Indian Services for the Bureau of Indian Affairs). This seems to recognize the unique role that Indian gaming serves in the economic life of heretofore impoverished Indian communities across this country.

As noted by the Fifth Circuit Court of Appeals, "[t]he fact that the [tribe] was engaged in an enterprise private or commercial in character, rather than governmental, is not material [to the availability of sovereign immunity]. It is in such enterprises and transactions that the Indian tribes and the Indians need protection." Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood, 361 F.2d 517, 521 (5th Cir.), cert. denied, Maryland Cas. Co. v. Seminole Tribe of Florida, Inc., 385 U.S. 918 (1966).

Further, LSI is owned wholly by the Community, as a governmental unit, unlike business enterprises organized under the corporate laws of Minnesota, the ownership of which is typically vested in private citizens, for their personal benefit. LSI's Board of Directors must include at least three members of the Community Business Council and a majority of the Board of Directors must be members of the Community. Articles of Incorporation, supra, at §§ 7.3 and 7.41 Also, directors may be removed from office in a proceeding commenced by 10% of the corporation (who are all of the members of the Community) in the Mdewakanton Sioux

Community Court. Id. at § 7.152. There is, therefore, a close link between the Community and the management of LSI. [6]

We also note that federal statutory law supports the notion that gaming activity is closely linked to the well-being of the tribe. All Indian gaming is conducted pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994). Under the provisions of IGRA, only tribal entities can engage in Indian gaming and gaming by Indian tribes is recognized as a "means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702 (1994). Thus, as a matter of federal law, LSI must be a tribal entity in order to conduct gaming authorized by the statute. A mere commercial activity, incorporated by Indian individuals for the ostensible purpose of conducting gaming in Indian country, would be prohibited from doing so under federal law. This seems to us a strong recognition of the close link between the tribe itself and LSI, the gaming business entity, and also of the federal policy encouraging tribal economic well-being through the operation of such gaming businesses.

The dissent seems to be influenced by the fact that LSI is a "for-profit, multi-million dollar" enterprise and therefore contends that our analysis under each of these factors is mistaken. With regard to the first factor, the purpose for which the business entity is organized, the dissent asserts that this factor would favor immunity for LSI if LSI were engaged in activity, such as providing housing or educational services, that directly benefited the tribe. This point ignores the force of Cabazon, which found that gaming activities could further tribal economic development and self-determination. Cabazon, 480 U.S. at 217-19. The dissent also argues that the

tribe is not involved in the day-to-day management of LSI and, therefore, LSI is more a private corporation than an extension of the tribal government. However, control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management. Lastly, the dissent asserts that granting sovereign immunity to LSI would be neutral, or possibly detrimental towards the federal goal of preserving tribal sovereignty and cultural heritage. We do not see how being successful in business and immune from suit necessarily undermines these goals. There is simply no way to avoid the fact that LSI is different from other corporations, regardless of how much money it makes--it is integrally related to the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe, and is, therefore, different, despite surface similarities to other for-profit enterprises.

A further concern, if this court were to reject LSI's claim of sovereign immunity, is the intrusion by this court into matters of centuries old common law [7] and federal policy, without the slightest suggestion from Congress or the United States Supreme Court that sovereign immunity for tribal corporations is now to be abandoned. We are reminded of the importance of the plenary role of Congress in determining the scope and application of the sovereign immunity doctrine in United States v. Wheeler where the Supreme Court stated:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects

> of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

435 U.S. 313, 323 (1978).

Gavle's appeal here is not unlike that of the State of Oklahoma in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991). In relation to the collection of state tax on the sale of cigarettes to tribal members on tribal land, the state argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context," and that "no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws." Id. at 510. The Supreme Court rejected this argument, reaffirming again the unique role of Congress in determining circumstances where the doctrine of sovereign immunity should be modified:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine * * *. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development * * *. Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Oklahoma Tax Comm'n, 498 U. S. at 510 (citations omitted). While the time may well come, or even be upon us now, that a

tribal owned corporation, operated for profit as is LSI, should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in the absence of some change in Congressional policy or direction from the U.S. Supreme Court indicating that under such circumstances elimination of the tribal corporation's sovereign immunity is appropriate.

Thus, we conclude that as a tribal business entity, formed to enhance the well-being of the Community and closely linked to it in governance, LSI has sovereign immunity from suit, unless it has waived that immunity by express and unequivocal action. We address the issue of waiver next.

Waiver

We begin with the basic tenet of Indian law that tribal sovereign immunity may be waived, but such a waiver must be express and unequivocal and may not be implied. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Gavle here argues that the Articles of Incorporation allow LSI to waive any immunity from suit, relying upon the language of section 3.2 providing that

> The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction;

However,

> to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a

contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent.

Articles of Incorporation, supra, at § 3.2.

Based on these provisions it is clear that LSI was legally authorized to waive its sovereign immunity defense by "explicit consent," contained in a contract or other commercial document" and "specifying the terms and conditions of such consent."

Gavle next asserts that these three requirements are met through LSI's registration with the Secretary of State as a foreign corporation, pursuant to Minn. Stat. § 303.01-.25 (1994). LSI's application to do business in Minnesota provides that the corporation irrevocably consents to service of process, as provided by Minn. Stat. § 303.13 (1994), and was signed by Allene Ross, vice-chair of LSI.

Thus, the issue before us is whether such a corporate registration and consent to service is the kind of "express and unequivocal" waiver of sovereign immunity that is called for under the Articles of Incorporation and that Santa Clara Pueblo and its progeny require. Like the court of appeals, we conclude that it is not. Quite simply, consent to service of process, and thus to personal jurisdiction, cannot be construed as an automatic waiver of an otherwise available affirmative defense. Presumably foreign corporations that register to do business in Minnesota do not understand that they are waiving their right to assert affirmative defenses, based, for example upon a statute of limitations, failure of consideration, accord and satisfaction and the like. See Minn. R. Civ. P.8.03

(1996). Similarly, we conclude that LSI, by agreeing to service of process, cannot be said to have waived the affirmative defense of sovereign immunity.

This conclusion is fully in accord with controlling federal case law. While it is true, as Gavle argues, that no "magic words" are necessary to operate as a waiver of sovereign immunity, Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc., 50 F.3d 560, 563 (8th Cir.), reh'g denied (Apr. 21, 1995), cert. denied, 116 S.Ct. 78 (1995), there are simply no words here, magic or otherwise, that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court. That kind of particularity is found, by contrast, in a tribal council resolution expressly waiving sovereign immunity. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982).

Furthermore, the New York Court of Appeals, in the face of an even more explicit state statutory provision, has recently held that the St. Regis Mohawk tribe did not waive its sovereign immunity merely by qualifying to do business as a foreign corporation in the state of New York.

> [T]he mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to "sue and be sued" does not automatically subject that corporate entity to any court's jurisdiction where jurisdiction is otherwise lacking. * * * [E]xpress invocation of the power to sue and be sued and submission to a particular forum by official tribal action is required.

Ransom, 86 N.Y.2d at 563, 658 N.E.2d at 995, 635 N.Y.S.2d at 122. We agree with this analysis.

Gavle also argues from cases which find the needed specificity in "sue and be sued clauses" contained in tribal contracts or other business documents. See, e.g., Fontanelle v. Omaha Tribe of Neb., 430 F.2d 143, 147 (8th Cir. 1970). If there were such a provision at issue here, our conclusion might indeed be different. LSI's articles of incorporation do indeed allow for a "consent to be sued," but they require that it be "explicit" and detailed as to "terms and conditions of the consent." We have no "sue or be sued" clause before us nor anything that specifies "terms and conditions of consent" and thus, there is no waiver of immunity based on this provision of the charter.

Finally, we also find inapposite Gavle's reliance on cases standing for the proposition that a foreign corporation that appoints an agent for service under Minn. Stat. § 303.13 necessarily consents to be sued. See, e.g., Beales v. L.D. Schreiber & Co., 56 F. Supp. 814, 815 (D. Minn. 1944) (citing Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939)); Rykoff-Sexton, Inc. v. American Appraisal Associates, Inc., 469 N.W.2d 88, 90 (Minn 1991). It is enough to note that none of these cases dealt with the issue of a waiver of Indian tribal immunity, for which, as noted above, the Supreme Court has identified specific requirements. Further, at most, they represent the proposition that appointment of an agent may serve as a concession on the issue of personal jurisdiction.

The Supreme Court's holding in Santa Clara Pueblo created a high threshold on the issue of a tribe's waiver of its sovereign immunity and manifested strong public policy protective of tribal independence. We cannot conclude that a mere

agreement to accept service of process rises to meet that threshold, and therefore. we hold that LSI did not waive its immunity from suit.

We note for the record that the dissent and other state judicial brethren have expressed displeasure that we find that sovereign immunity may extend to a tribal business entity. However, we find no statute or congressional mandate that denies Indian tribes their sovereign status. As recently as 1991, the Supreme Court noted that "[a] doctrine of Indian sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or limit it. * * * Instead, Congress has consistently reiterated its approval of the immunity doctrine." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505, 510 (1991) (citations omitted).

So, too, do we reiterate and reaffirm that doctrine by our holding today

Affirmed.

DISSENT

KEITH, Chief Justice (dissenting in part).

I respectfully dissent. While I agree with the majority that state courts have concurrent jurisdiction with tribal courts in lawsuits of this type, I disagree with the majority's conclusion that for-profit, multi-minion dollar private tribal businesses like Little Six, Inc. (LSI) may rely upon the same sovereign immunity defense to which the tribe itself is entitled. As the

majority frames the issue, the question is whether LSI is a tribal, entity "analogous to a governmental agency" which should benefit from the sovereign immunity defense, or whether LSI is in fact a "commercial business enterprise, instituted solely for the purpose of generating profits for its private owner." It seems to me that LSI clearly fits the latter definition. Accordingly, I would reverse the decision of the court of appeals and permit Gavle to pursue her various claims against LSI in state court.

The result of the majority's decision in this case is to grant total immunity from suit to a complex, for-profit corporate entity with hundreds of employees which transacts business both inside and outside Indian country. By extending the sovereign immunity defense to include LSI, the majority ignores the historical purpose of the sovereign immunity doctrine in this country as applied to Indian tribes, which is to grant special independent sovereign status to Indian tribes and their governmental bodies. In no way does LSI conform to the ordinary conception of a non-profit, governmental entity entrusted with promoting the welfare of its citizens: clearly, LSI is first and foremost a corporation engaged in a for-profit business venture for the purely financial benefit of its shareholders.

The majority cites several factors which other courts have relied upon to answer the "important, complex and unresolved question" of whether tribal sovereign immunity protects commercial activities. Selecting just three of these factors, the majority then reaches the conclusion that LSI is entitled to sovereign immunity in this case. I disagree. First, the majority cites LSI's own Articles of Incorporation as "evidence" of LSI's intended purpose of "improving the

business, financial or general welfare of the Corporation, Members of the Corporation, and the Community." This language, however, could be found in the articles of incorporation of any for-profit corporation and certainly does not suggest that LSI was intended to benefit the Community in the same sense as a housing authority, educational fund, agricultural cooperative or other extension of the tribal government intended solely to promote the tribe's well-being. Instead, it is clear from the trial court record that LSI's primary purpose is to generate profits for its shareholders (i.e., the tribe's members) without any restrictions whatsoever on the use of the funds from the casino. I do not mean to suggest that generating profits for the tribe's members is an improper or unethical objective, but merely point out that a corporation like LSI should not receive the same protections as tribal businesses whose funds are directed towards general improvements for the community as a whole, such as education, environmental protection, health care or job opportunities. [8]

Second, the majority is persuaded by the fact that LSI's single share of stock is owned by the Community as a whole, and that its Board of Directors must include a majority of Community members. However, this does not change the fact that LSI is a private corporation, registered to transact business in the State of Minnesota like any other private business, and certainly not an extension of the tribal government per se. Furthermore, LSI was not incorporated under Section 17 of the Indian Reorganization Act, which extends sovereign immunity to corporations formed by tribal governments to further the tribe's economic interests. See 25 U.S.C. §§ 476, 477 (1994). The tribal government is not involved in the day-to-day operations of LSI's business

ventures, does not select or supervise the board of directors, nor is tribal property threatened by judgments against the corporation. As the court of appeals found, LSI "was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity." Gavle v. Little Six, Inc., 534 N.W2d 280, 284 (Minn. App. 1995).

And finally, the majority claims that extending sovereign immunity to LSI will follow federal policy encouraging the tribe's autonomy and general welfare. However, denying sovereign immunity to LSI, a corporation whose primary responsibilities consist of running a casino, would not infringe upon the federal government's laudable goals of cultural preservation, conservation of natural resources owned by the tribe, or promotion of tribal self-government. The assets of the Community would not be jeopardized by court judgments against LSI, and in fact there is a persuasive argument that extending sovereign immunity to corporations like LSI could be potentially detrimental to the tribe's business interests. As the Arizona Supreme Court noted in Dixon v. Picopa Construction Co., 160 Ariz. 251, 259, 772 P.2d 1104, 1112 (Ariz. 1989), "an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into contractual relationships with that Indian corporation or any other Indian corporation. Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit."

I find substantial similarities between the facts at issue in this case and those considered by the Arizona court in Dixon. In that case, the court held that a construction company

incorporated by an Indian tribe was not a "subordinate economic organization," and therefore was not entitled to assert the tribe's sovereign immunity defense in a tort action brought by an automobile driver following an off-reservation automobile accident. Id., 772 P.2d at 1108-10 (citing White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971)). Like LSI, the Picopa Construction Company involved in the Dixon case had a board of directors separate from the tribal government and with exclusive administrative control of the corporation's day-to-day operations, was instituted as a for-profit business venture with the Community as the sole shareholder, was not organized under Section 17 of the Indian Reorganization Act, and was not intended to carry out the Community's governmental functions. Id. at 1107-11. I would follow the Arizona court's reasoning in Dixon and Shelley, and require that a business incorporated under tribal law show itself to be an extension of the tribal government in order to take advantage of the tribe's sovereign immunity defense. In this case, it is clear that LSI does not meet this test. In conclusion, I believe that Gavle should be permitted to pursue her claims against LSI in state court because LSI is not an economic organization subordinate to the tribal government.

DISSENT

COYNE, Justice (dissenting).

I dissent. Little Six, Inc., applied for and was granted a certificate of authority to transact business in Minnesota as a foreign corporation in accordance with Chapter 303 of Minnesota Statutes. For more than 50 years before the

incorporation of Little Six, Inc., Minnesota has accorded registered foreign corporations the following powers:

> After the issuance of a certificate of authority by the secretary of state and until cancellation or revocation thereof or issuance of a certificate of withdrawal, the corporation shall possess within this state the same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the articles of incorporation of such foreign corporation pursuant to which its certificate of authority is issued, and shall be subject to the laws of this state.

Minn. Stat. § 303.09 (1994) (emphasis added). Gavle complains of violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1994). The requirements of the Minnesota Human Rights Act are applicable to the state and its political subdivisions as well as to private employers, and I can see no earthly reason for permitting a foreign corporation to depart the Shakopee Mdewakanton Sioux (Dakota) reservation and to violate with impunity the human rights of Minnesota citizens while transacting business in Minnesota.

That Indian tribes retain a unique sovereignty is beyond dispute. When the members of the tribe reside on the reservation and confine their commercial activities to the reservation, the State of Minnesota may not and does not subject the tribe's members to the state's tax laws. Brun v. Commissioner of Revenue, 549 N.W.2d 91 (Minn. 1996). When, however, the sovereign becomes a merchant, his license to carry on his commercial activity on foreign soil and to carry on his trade with the inhabitants of the foreign state is expressly subject to the laws of the licensor. Little Six, Inc.,

like any other foreign corporation, must be deemed to have accepted the certificate of authority to transact business in Minnesota subject to its express limitations.

As Chief Justice John Marshall put it in 1812, although the "Military force which supports the sovereign power and maintains the dignity and independence of a nation" is not subject to the jurisdiction of another sovereign nation whose borders the military force crosses under license to do so, "[a] prince, by acquiring private property in a foreign country, * * * may be considered as so far laying down the prince, and assuming the character of a private individual," that he subjects the property to the territorial jurisdiction. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 145 (1812).

In modern parlance that statement means that if a commercial entity enters a commercial arena outside its own territory pursuant to a Minnesota certificate of authority to transact business as a foreign corporation, the foreign corporation is subject not merely to Minnesota's jurisdiction, but it is subject to the laws of Minnesota and the defense of sovereign immunity is, at the very least, of no more avail to the foreign corporation than it is to the state and its political subdivisions.

Therefore, I would reverse the lower courts and remand for vacation of the summary judgment in favor of Little Six, Inc.

Footnotes

[1] "Indian Country" includes land within Indian reservations, dependent Indian communities, and Indian allotments. 18 U.S.C. § 1151 (1994).

[2] Gavle's allegations of injury involve actions by defendants Leonard Prescott, Allene Ross and William Johnson, corporate officers of LSI, but those individual claims are not at issue here.

[3] Getches, et al., Federal Indian Law at 8.

[4] Public Law 280, now codified as 28 U.S.C. § 1360 (1994), identified six original states whose state courts would have jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country * * *." This law was later modified by the law now codified as 25 U.S.C. § 1322 (1994) to give state courts jurisdiction over civil matters in Indian country "with the consent of the tribe." However, the original six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) all retained original civil jurisdiction even without the consent of the tribes.

[5] The Supreme Court has repeatedly recognized that tribal courts have inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians which are based upon events occurring in Indian country. Montana v. United States, 450 U.S. 544, 566, reh'g denied, 452 U.S. 911 (1981). We note further that the Judicial Court of the Shakopee Mdewakanton Sioux Community has

previously ruled that LSI enjoys the same sovereign immunity as the tribe itself. See, e.g., Culver Security Systems v. Little Six, Inc., Court File No. 026-92, slip op. at 3-4 (Shakopee Mdewakanton Sioux (Dakota) Tribal Court June 14, 1995).

[6] We note also that an amended Community Corporation Ordinance and restated Articles of Incorporation of LSI, filed after the commencement of this litigation, provide an even closer link between the members of the Community and the management of LSI. See Articles of Incorporation of Little Six, Inc. (amended, Feb. 28, 1995).

[7] See The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

[8] See, e.g., Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc., 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (N.Y. 1995) (non-profit tribal corporation organized to provide education and health services to tribe enjoyed tribe's sovereign immunity); White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971) (tribal agency empowered with management of tribe's timber resources was "subordinate economic organization" and therefore was immune from suit); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983) (agricultural venture created to promote economic welfare of Indian community and whose property was entirely owned by community was "subordinate economic organization" of tribal government and therefore entitled to tribal sovereign immunity).

Supreme Court, U.S.
FILED
JUL 9 1997
SUPREME OF THE CLERK

No. 96-1962

In The

Supreme Court of the United States

October Term, 1997

SYLVIA COHEN,

Petitioner,

vs.

LITTLE SIX, INC., a foreign corporation, d/b/a Mystic Lake Casino,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN F. OLSON, *Counsel of Record*
BLUEDOG, OLSON & SMALL, P.L.L.P.
Southgate Office Plaza, Suite 500
5001 West 80th Street
Minneapolis, Minnesota 55437
Telephone (612) 893-1813

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED BY THE PETITION

1. Did Congress confer sovereign immunity on Indian tribes?

   This question was not addressed below.

2. If so, is such conferral subject to strict constitutional scrutiny under *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995)?

   This question was not addressed below.

3. Does recognition by the Minnesota Supreme Court that state courts do not have subject matter jurisdiction over a tort claim, where the defendant is a wholly-owned enterprise of a sovereign Indian tribe, constitute state action for purposes of equal protection analysis?

   This question was not addressed below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY THE PETITION..... i

TABLE OF CONTENTS..... ii

STATEMENT OF THE CASE..... 1

ARGUMENT 1

I. REVIEW OF THE QUESTIONS PRESENTED BY THE PETITION IS NOT APPROPRIATE AT THIS TIME, AS THEY WERE NOT PROPERLY ASSERTED BELOW AND THE MINNESOTA SUPREME COURT DID NOT PASS ON THE ISSUES 2

II. TRIBES EXERCISE INHERENT POWERS OF A LIMITED SOVEREIGNTY WHICH HAS NEVER BEEN EXTINGUISHED..... 7

III. TRIBAL SOVEREIGN IMMUNITY DOES NOT EXIST "BY VIRTUE OF CONGRESSIONAL ACTION." 11

IV. EVEN IF TRIBAL SOVEREIGN IMMUNITY WERE NOTHING MORE THAN A FEDERAL AFFIRMATIVE ACTION PROGRAM, THE SOUND REASONING OF THIS COURT IN *MORTON* WOULD CONTROL, AND DOES NOT CONFLICT WITH *ADARAND* 14

V. THE MINNESOTA SUPREME COURT'S ORDER, RECOGNIZING THAT THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ABROGATE THE TRIBE'S IMMUNITY, DID NOT CONSTITUTE "STATE ACTION" FOR PURPOSES OF EQUAL PROTECTION ANALYSIS 18

CONCLUSION 20

TABLE OF CONTENTS – Continued

Page

APPENDIX

Trial Court's Order and Judgment .....App. 1

Notice of Appeal to Court of Appeals .....App. 11

Petitioner's Motion for Rehearing .....App. 16

Petition for Review of Decision of Court of Appeals .....App. 22

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) ..... *passim*

Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) 7

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943) 16

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 6

Bryan v. Itasca County, 426 U.S. 373 (1976).....8, 20

California v. Cabazon Band of Mission Indians et al., 480 U.S. 202 (1987) 9, 20

Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1981) 9

Cherokee Intermarriage Cases, 203 U.S. 76 (1906) 16

Cherokee Nation v. Georgia, 8 L.Ed. 25 (1831).....8, 17

Clark v. Jeter, 486 U.S. 456 (1988) 6

Idaho v. Coeur d'Alene Tribe, No. 94-1474 (issued June 23, 1997) 7

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) 9

Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) 7

Mattz v. Arnett, 412 U.S. 481 (1973)..... 20

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 17

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 9

TABLE OF AUTHORITIES – Continued

Page

Morton v. Mancari, 417 U.S. 535 (1974)..... *passim*

Morton v. Ruiz, 415 U.S. 199 (1974)..... 17

National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985)..... 10

New Mexico v. Mescalaro Apache Tribe, 462 U.S. 324 (1983)..... 9

Oklahoma Tax Commission v. Potawatomi Tribe, 498 U.S. 505 (1991)..... 13

Oliphant v. Suquamish Indian Tribe, 435 U.S. 197 (1978)..... 10

Perry v. Thomas, 482 U.S. 483 (1987)..... 6

Pope v. Illinois, 481 U.S. 497 (1987)..... 6

Prescott, et al. v. Little Six, Inc., 897 F. Supp. 1217 (D. Minn. 1995)..... 10

Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165 (1977)..... 13

Rice v. Rehner, 463 U.S. 713 (1983)..... 11

Riggins v. Nevada, 504 U.S. 127 (1992)..... 6

Roff v. Burney, 168 U.S. 218 (1897)..... 16

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)..*passim*

Shelley v. Kraemer, 334 U.S. 1 (1948).....18, 19

Simmons v. Eagle Seelatsee, 384 U.S. 209 (1966)..... 17

Sloan v. Lemon, 413 U.S. 825 (1973)..... 18

United States v. Kagama, 118 U.S. 375 (1886)..... 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Mazurie, 419 U.S. 544 (1975)... 8, 9, 20

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 13

United States v. Wheeler, 435 U.S. 313 (1978).. 8, 10, 11

Williams v. Lee, 358 U.S. 217 (1959)..... 3, 10, 17

Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1832) 8

STATE CASES

Cohen v. Little Six, Inc., 543 N.W.2d 376 (Minn.App. 1996)..... 3, 5

Gavle v. Little Six, Inc., et al., 555 N.W.2d 284 (Minn. 1996)..... 1, 3, 6

CONSTITUTION

U.S. Const. art. I, § 8, cl. 3 17

STATUTES, CODES AND RULES

25 U.S.C. § 1302..... 10

25 U.S.C. § 2701, *et seq* 1

25 U.S.C. § 476..... 9, 10, 14, 15

ABA Model Rules of Conduct 3.3(a)(i) 12

F.R.C.P. 11..... 12

MN.R.C.P. 3.1(a)(3) 12

LEGISLATIVE/RULEMAKING HISTORY

55 Interior Dec. 14 (1934)..... 10

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

American Indian Policy Review Comm'n, 95th Cong., 1st Sess., *Final Report* (1977) 16

F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) ..7, 15

F. Cohen, *Handbook of Federal Indian Law* (1945 ed.) 8

F. Victoria, *De Indis et de Jure Belli Relictiones* 128 (J. Bate transl. 1917) (orig. ed. 1557) 7

STATEMENT OF THE CASE

Petitioner brought suit in Minnesota state district court, alleging that various injuries resulted from a visit to Mystic Lake Casino, owned and operated by Respondent, Little Six, Inc. ("LSI"). LSI is a corporation wholly-owned by the Shakopee Mdewakanton Sioux (Dakota) Community, a federally-recognized Indian tribe (the "Tribe"), and is the instrumentality through which the Tribe operates its lawful gaming activities pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*

The trial court dismissed the complaint for lack of subject matter jurisdiction, based on LSI's sovereign immunity from suit. The Minnesota Court of Appeals affirmed the trial court's dismissal, holding as well that Minnesota courts lacked subject matter jurisdiction over a claim arising entirely within Indian country, and involving an Indian tribe or instrumentality of a tribe. The Minnesota Supreme Court, in turn, summarily affirmed the Court of Appeals decision, relying on its opinion in *Gavle v. Little Six, Inc., et al.*, 555 N.W.2d 284 (Minn. 1996), *petition for cert. pending* (No. 96-1215, docketed Jan. 30, 1997). (Petition A-78).

ARGUMENT

The Petition is nothing more than a house built on sand. It is based on the astounding assertion that "[t]ribal sovereign immunity exists by virtue of Congressional action . . . ," (Petition 19), and is predicated on the false assumption that Congress is the source of tribal sovereignty. Petitioner implies that sovereign immunity is a

federal affirmative action program, and should therefore be subject to strict scrutiny under the United States Constitution, as are other race-based federal programs. *Id.* at 8, *citing Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). Disregarding the fact that this argument was not addressed below, the Petition must be rejected, for tribal sovereignty is *inherent* and does not exist by virtue of congressional action. Nor was tribal sovereign immunity created by a federal statutory scheme. The purported conflict between *Adarand* and *Morton v. Mancari*, 417 U.S. 535 (1974) (which Petitioner urges as the primary basis for grant of the Writ) does not exist. There is no state action at issue here to result in a denial of equal protection, nor is there a conflict among the courts respecting the issues urged as basis for granting the writ. When Petitioner's arguments are examined in light of 150 years of sound judicial precedent concerning Indian tribal sovereignty, it is clear that the Petition must be denied.

I. REVIEW OF THE QUESTIONS PRESENTED BY THE PETITION IS NOT APPROPRIATE AT THIS TIME, AS THEY WERE NOT PROPERLY ASSERTED BELOW AND THE MINNESOTA SUPREME COURT DID NOT PASS ON THE ISSUES.

Petitioner is appealing the Minnesota Supreme Court's summary affirmance of the Minnesota Court of Appeals' affirmance of the trial court's dismissal of the cause for lack of subject matter jurisdiction. *See* Minnesota Supreme Court Order (Petition A-2); Minnesota

Court of Appeals Opinion (Petition A-3); Trial Court's Order and Judgment (App. 1).[1] The trial court based its dismissal on its recognition of the fact that LSI shares the Tribe's immunity from unconsented suit, and that neither the Tribe nor LSI had waived, nor had Congress abrogated that immunity. (App. 10).

There was only one federal constitutional issue raised in the trial court and the Court of Appeals. Petitioner argued that dismissal would relegate the claim to tribal court, which Petitioner asserted is *necessarily* a

---

[1] Yet, astonishingly, Petitioner still asserts that it "prevail[ed] in the courts below on subject matter jurisdiction." Petition 7 n.1, *citing* the decision of the Minnesota Supreme Court in *Gavle*. Contrary to Petitioner's assertion that *Gavle* overrules the Court of Appeals in this case on the issue of subject matter jurisdiction of Minnesota courts over a claim against a tribe or instrumentality of a tribe where the cause of action arose entirely within Indian country, *Gavle* left the issue open. All matters in issue here occurred in Indian country, and it is clear from a careful reading of *Gavle* that Minnesota courts would not have subject matter jurisdiction over this suit even if sovereign immunity were never asserted. Such jurisdiction would clearly lie with the Tribal Court, as determined by the Court of Appeals. *Cohen*, 543 N.W.2d at 381, *citing Williams v. Lee*, 358 U.S. 217 (1959) (Petition A-10-12). If it were true that Petitioner *had* prevailed on the issue of subject matter jurisdiction in the courts below, then this Petition would never have been filed.

violation of the federal guarantee of due process of law. *See* Minn. Ct. of Appeals Opinion (Petition A-13).[2] In order to further the due process argument, Petitioner also insinuated that the court's recognition of sovereign immunity would amount to state action for purposes of the due process analysis. The trial court did not even find it necessary to address these specious arguments. *See* Trial Court's Order and Judgment (App. 1).

After the trial court granted LSI's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Petitioner appealed her due process claim to the Minnesota Court of Appeals. As defined by Petitioner:

> The issues raised on appeal will include the following: (1) Whether Congress' codification of the Indian Gaming Regulatory Act, coupled with the Tribal-State Compacts between the Shakopee Mdewakanton Dakota Sioux Community [sic] and the Certificate of Authority to Transact Business in the State of Minnesota under Minn. Stat. § 303.01, acts as a clear waiver of sovereign immunity, with respect to requirements of the Indian Gaming Regulatory Act,

---

[2] Petitioner states that constitutional due process is violated where exclusive or primary jurisdiction is in tribal courts, asserting such courts lack "judicial independence and adequate procedures." Petition 7 n.1, *citing* the dissenting opinion in *Cohen*. It bears noting that there was *absolutely nothing* of record to support the dissent's diatribe regarding tribal courts. Given the dissent's obvious disregard for that fundamental tenet of American jurisprudence – a decision by a court *must be based on the record* – it is small wonder that the Minnesota Supreme Court declined to respond to Petitioner's due process claims, when those claims relied upon the dissent's opinion for support.

> specifically, the Respondent's duty to construct, operate and maintain it's [sic] facility to insure the public' [sic] health and safety; and (2) Whether sovereign immunity in this suit violates Appellant's guarantees of substantive due process under the United States Constitution.

Notice of Appeal to Court of Appeals at ¶ 5 (App. 14).

At this point, Petitioner had not raised even a hint of the current argument that sovereign immunity is a federal program subject to strict scrutiny under equal protection analysis. The Court of Appeals promptly affirmed the trial court's dismissal, holding that, not only had LSI not waived its sovereign immunity from suit, but Minnesota courts lack subject matter jurisdiction in the first instance to hear claims against LSI arising from acts occurring entirely in Indian country, and that such claims must be brought in tribal court. *See Cohen*, 543 N.W.2d 376 (Minn.App. 1996) (Petition A-10-12). The Court of Appeals also promptly disposed of Petitioner's due process argument, holding that the Petitioner had "not been deprived of her day in court, but only of her day *in the court of her choice*." (*Id.* A-13, emphasis in the original). No doubt inspired by the aberrant dissenting opinion in the Court of Appeals (*Id.* A-14),[3] Petitioner proposed the new

---

[3] It can hardly be said with any certainty that the Court of Appeals dissent raised the present issues *sua sponte*, but it can hardly be said that it did not. Judge Randall's sprawling opinion (63 pages) covered topics as diverse as World War II-era Japanese interment camps (Petition at A-58) and the Pledge of Allegiance (Petition at A-61), and relied extensively on matters not of record in the proceedings, but had relatively little to do with the actual issues at hand.

equal protection argument for the first time in the Minnesota Supreme Court. *See* Petition for Review of Decision of Court of Appeals (App. 23).

Although the Minnesota Supreme Court granted review, it took no notice of this new claim, relying instead on its opinion in *Gavle*. (Petition A-78). In *Gavle*, the Court held that LSI shared the Tribe's immunity (*Id.* A-102), and had not waived it (*Id.* A-106) – the very basis for the trial court's dismissal in the present case. It was unnecessary, then, to restate in this case what had been held in *Gavle*. Petitioner's due process claims were given no credence, and the court declined to address the new equal protection claim (even after Petitioner's Motion for Rehearing, App. 16).

"When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (internal citations omitted). It is not appropriate for the Court to pass on questions not properly presented to the Minnesota Supreme Court. *Riggins v. Nevada*, 504 U.S. 127, 133 (1992); *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988). Nor is it appropriate for this Court to review questions not addressed below. *See Perry v. Thomas*, 482 U.S. 483, 492 (1987); *Pope v. Illinois*, 481 U.S. 497, 504 (1987).

There may be some doubt as to whether failure to present issues before the state courts, or failure of the

Minnesota Supreme Court to address the issues, establishes a *jurisdictional* bar to this Court's review. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) ("Whether appellant's failure to raise these claims in the [state] courts deprives us of all power to review them under our certiorari jurisdiction is an unsettled question."). But, regardless of whether the bar to review is jurisdictional or merely prudential, the Court should decline to hear Petitioner's new claims at this time.

II. TRIBES EXERCISE INHERENT POWERS OF A LIMITED SOVEREIGNTY WHICH HAS NEVER BEEN EXTINGUISHED.

Even if the issues had been properly presented, they are fundamentally flawed. The sovereign status of Indian tribes has been recognized since the earliest recorded interactions between Europeans and Indian people. As early as 1557 tribal sovereignty was acknowledged as the basis for treaties between Europeans and the original inhabitants of the lands presently contained within the borders of the United States. *See* F. Victoria, *De Indis et de Jure Belli Relictiones* 128 (J. Bate transl. 1917) (orig. ed. 1557); F. Cohen, *Handbook of Federal Indian Law* 52-55 (1982 ed.). As indigenous people with powers of self-government, the United States was compelled to treat with the Indians, and to establish government-to-government relationships with Indian tribes. This Court acknowledged the sovereign status of Indian tribes as early as 1823, *see Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 593-94 (1823), and Supreme Court precedent from that day to this has consistently reaffirmed that Indian tribes are sovereign. *See Idaho v. Coeur d'Alene Tribe*, No.

94-1474 (issued June 23, 1997) (recognizing that "the plan of the [constitutional] convention did not surrender Indian tribes' immunity for the benefit of the States").

The present right of tribes to govern their territories and the persons within them flows from this preexisting sovereignty, a sovereignty that pre-dates the United States Constitution, as was fully recognized by the Supreme Court in *Cherokee Nation v. Georgia*, 8 L.Ed. 25 (1831). The status of Indian tribes in the law is unique, for they are "domestic dependant nations." *Id.* The sovereignty of Indian tribes was not delegated by the federal government, *United States v. Wheeler*, 435 U.S. 313, 328 (1978), created by the United States Constitution, or granted by any federal act, for the powers of Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished." *Id.* at 322, *citing* F. Cohen, *Handbook of Federal Indian Law*, at 122 (1945 ed.).

Central to the discussion of Petitioner's claims is the fundamental proposition that Indian tribes function as "distinct, independent political communities, retaining their original natural rights." *Worcester v. Georgia*, 31 U.S. (6 Pet) 515, 559 (1832); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Petitioner seeks to have this Court treat Indian tribes as little more than private voluntary organizations, a proposition long rejected by this Court. *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976) (holding that states are without civil regulatory jurisdiction over Indian tribes, and stating that the Supreme Court long ago rejected the idea that Indian tribes are little more than "private, voluntary organizations"), *citing United States v. Mazurie*, 419 U.S. 544, 557 (1975). It is their

inherent sovereignty which permits Indian tribes to exercise powers of self-government over their territories and the persons within them, *Mazurie*, and it is the original natural rights of Indian tribes, including powers of self-government and the right to function immune from suit, to which Petitioner is truly opposed.[4]

In addition to ignoring the fact that Indian tribes are governments, not simply groups of individuals, Petitioner ignores the distinction between *inherent* sovereignty and the exercise of powers delegated from the federal government. Although the exercise of powers of self-government in the sphere of civil jurisdiction may be subject to Congress' plenary oversight, *see, e.g.*, 25 U.S.C.

---

[4] Tribal sovereignty has been recognized in a variety of contexts, which include, but are not limited to: the right of Indian tribes to conduct gaming on reservation lands, *California v. Cabazon Band of Mission Indians et al.*, 480 U.S. 202 (1987) (holding state and local gaming regulations not applicable on tribe's reservation, and that Indian tribe had inherent sovereign authority to engage in gaming activity); the jurisdiction of a tribal court over causes of action arising in Indian country, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (finding that federal district court must abstain from hearing an action where there exists a tribal forum with a colorable claim to jurisdiction); tribal taxing authority, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding tribal severance tax on oil and gas leases of non-Indians was valid exercise of inherent tribal sovereignty); tribal hunting and fishing regulation, *New Mexico v. Mescalaro Apache Tribe*, 462 U.S. 324 (1983) (holding tribal code regulating non-Indian hunting and fishing on reservation lands was valid exercise of inherent sovereign authority); and tribal health regulation, *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981), *cert. denied*, 496 U.S. 967 (1982) (holding application of tribal health regulations to non-Indians on fee lands within the reservation a valid exercise of inherent tribal sovereign authority).

§ 476 [Indian Reorganization Act]; 25 U.S.C. § 1302 [Indian Civil Rights Act], such oversight did not create the Indians' power to govern themselves; it merely reflects Congress' recognition of inherent tribal sovereignty. The exercise of tribal powers of self-government does not require congressional action, for tribal powers of self-government exist at law already, *Wheeler*, 435 U.S. at 315; *see also National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854-855 (1985), and are retained to the extent "not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 197 (1978); *see also* 55 Interior Dec. 14 (1934).[5]

Petitioner cites no treaty, statute or withdrawal by implication of the Tribe's sovereign status that would warrant the conclusion that the Tribe exists, or has authority to assert its powers of self-government only by virtue of affirmative Congressional action. Clearly, Indian tribes have not given up their inherent sovereignty wholesale, *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Wheeler*, 435 U.S. at 323, nor has the Tribe ceded *its* inherent sovereignty, as evidenced by continued recognition by the federal government. *See, e.g., Prescott, et al. v. Little Six, Inc.*, 897 F. Supp. 1217, 1220 (D. Minn. 1995).

---

[5] Those attributes of sovereignty withdrawn by treaty or statutes are the authority to determine relations with foreign governments and the authority to freely alienate tribal lands. *Wheeler*, 435 U.S. at 323. The attribute withdrawn by implication as a necessary result of the dependant status of tribes is the authority to exercise criminal jurisdiction over non-members of the tribe. *Oliphant*, 435 U.S. at 197. None of these attributes is in issue here.

Because Petitioner's entire argument rests on the proposition that Indian tribal sovereignty is created by congressional act, and because this underlying premise is patently false, the Court should deny the Petition.

III. TRIBAL SOVEREIGN IMMUNITY DOES NOT EXIST "BY VIRTUE OF CONGRESSIONAL ACTION."

In an effort to lend credence to the argument that sovereign immunity is the equivalent of a federal affirmative action program, amenable to analysis under the reasoning of this Court in *Adarand*, Petitioner makes the outrageous claim that "Tribal sovereign immunity exists by virtue of Congressional action . . . ," (Petition 19), and cites *Rice v. Rehner*, 463 U.S. 713, 719 (1983); *Santa Clara Pueblo*, 436 U.S. at 58; and *Wheeler*, 435 U.S. at 313, for support. This is a blatant misstatement of the holdings of these cases. None of them expressly states, or even remotely begins to imply, that sovereign immunity is nothing more than a "federal benefit." (Petition 9). To the contrary, each cited case, *at the page identified by Petitioner*, states that the sovereign powers of Indian tribes are *inherent*, and are retained to the extent not divested by an exercise of Congress' plenary power over Indian tribes.

Petitioner further states, entirely without support from either decisional or statutory law, that "Congress, in an exercise of its plenary power, has established a *statutory scheme* permitting Indian tribes, and no other group, to assert sovereign immunity as a defense in all civil

cases." (Petition 19, emphasis added). Yet, incredibly, Petitioner fails to cite to the law creating this purported "statutory scheme". Considering that congressional action is absolutely essential to Petitioner's "strict scrutiny" argument, and in light of the fact that the purported statute would constitute the only evidence of such congressional action sufficient for this Court to apply "strict scrutiny" to any aspect of this case, Petitioner's failure to cite the purported statute should settle the matter for this Court.[6] If such a statute exists, then perhaps Petitioner's arguments would warrant some consideration; absent such a statute, they warrant none.[7]

To state that Indian tribes are sovereign is, therefore, a truism. That Indian tribal sovereignty is inherent, and was not created by Congressional action is one of the bedrock legal principles in the area of federal Indian jurisprudence. *See* discussion *infra.* at II. Further, to state that "dependent as well as dominant sovereigns" are

---

[6] It is a violation of the rules governing practice before this Court for Petitioner's counsel to mislead the Court. Petitioner's counsel has stated as fact that there is a statutory scheme, established by Congress, permitting Indian tribes to assert sovereign immunity from suit, when clearly there is none. Rule 11 requires candor toward the tribunal, and prohibits a lawyer from knowingly making a misleading legal argument to the tribunal. F.R.C.P. 11; *see also* ABA Model Rules of Conduct 3.3(a)(i); MN.R.C.P. 3.1(a)(3).

[7] Petitioner's apparent concern for the rights of Indian tribes (Petition 17-19), and her desire to protect Indians and tribes from racially-motivated congressional action is truly moving; however, LSI would remind the Court that Petitioner is in no position to assert the rights of Indian tribes as a basis for grant of the Petition, given that she is litigating against one.

exempt from suit without consent, and that the immunity was *"theirs as sovereigns"*, as this Court did in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), simply confirms the inherent nature of tribal sovereignty. The Tribe is entitled to all the benefits of its sovereign status, including the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58 (internal cites omitted).

While tribal immunity from unconsented suit is not created by congressional action, congressional action *is* required to waive such immunity. *U.S. F & G.*, at 514 (stating that the sovereign right of immunity from suit could be waived only by congressional action).[8] Congress has not acted to waive the Shakopee Community or LSI's sovereign immunity from suit.

Petitioner's argument is predicated on acceptance by the Court of the proposition that sovereign immunity is the result of a statute enacted by Congress. Because this proposition is entirely false and patently misleading, and because tribal sovereign immunity is an incident of inherent tribal sovereignty, *not* the result of congressional

---

[8] LSI would note that an Indian tribe may also waive its immunity from unconsented suit. *See Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165 (1977) (*Puyallup III*) (holding that waiver of sovereign immunity from suit must be unequivocally expressed by Congress or the tribe); *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991) (finding that only tribe or Congress can waive tribe's sovereign immunity from suit). But, given that Petitioner's argument addresses only congressional action, and that she has not asserted LSI waived its immunity from suit, LSI refrains from further discussion regarding tribal waivers of immunity.

action, Petitioner's argument must fail. Given that it is congressional *inaction* to which Petitioner truly objects, and because without congressional action, there is nothing to which this Court can apply strict scrutiny, Petitioner's argument should be rejected. The sand upon which Petitioner has constructed the house of her argument has been washed away by the tide of sound judicial precedent; that house has fallen. The Petition should be denied.

IV. EVEN IF TRIBAL SOVEREIGN IMMUNITY WERE NOTHING MORE THAN A FEDERAL AFFIRMATIVE ACTION PROGRAM, THE SOUND REASONING OF THIS COURT IN *MORTON* WOULD CONTROL, AND DOES NOT CONFLICT WITH *ADARAND*.

Even if the insupportable assumptions upon which the Petition is based were true – that tribal sovereignty is federally delegated, and that tribal sovereign immunity is a federal affirmative action program – this Court disposed of Petitioner's arguments twenty-three years ago, in *Morton*. Specifically, the Court held that, as long as federal preferences for Indians are reasonable and rationally designed to further Indian self-government, such preferences will not violate the United States Constitution. 417 U.S. at 555.[9]

---

[9] Even if Petitioner were to argue that adopting a constitution under provisions of the Indian Reorganization Act, 25 U.S.C. § 476, constitutes federal action creating a race based preference, such argument could not pass muster. "While the exercise of powers under these constitutions was expressly

Petitioner argues that because sovereign immunity is created by congressional action, it requires strict judicial scrutiny, and that *Morton* is in conflict with *Adarand* because *Morton* imposes only a rational-basis test, and purportedly supports race-based preference. Notwithstanding Petitioner's treatment of tribal sovereign immunity as a mere delegation of federal authority, this argument is contrary to this Court's precedent and most every authority on the subject. As this Court recognized in upholding the constitutional validity of Section 12 of the Indian Reorganization Act, 25 U.S.C. § 476, *et seq.*, "this preference does not constitute 'racial discrimination.' Indeed, it is not even a racial preference." *Morton*, 417 U.S. at 553. As the Court noted:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially classified as "Indians".

Id. at n. 24. In the present case, even if Petitioner could substantiate that sovereign immunity exists by virtue of congressional action (which Petitioner clearly cannot), the "preference" of sovereign immunity would apply only to federally recognized *tribes*. It would not apply to all

---

sanctioned by Congress, the tribes adopting them continue to exercise their unextinguished powers of sovereignty and not statutorily delegated powers. In *Santa Clara Pueblo*, 436 U.S. 49 (1978), for example, the tribe had adopted a constitution under the Indian Reorganization Act, *id.* at 66 n.22, but the Court spoke only of inherent, not delegated, tribal powers. *Id.* at 71-72." F. Cohen, *Handbook of Federal Indian Law* 247-48 (1982 ed.).

groups of people who could identify themselves racially as "Indians."[10]

"On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." *Morton*, at 554, *citing, e.g., Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (federally

---

[10] The Petition exhibits a distractingly simple view of tribal membership, and its bearing on the present issues. Petitioner assumes, for example, that membership is universally based on Indian blood quantum, a racial distinction. (Petition 10-11). But, not all tribes require a specific quantum of "Indian" blood for membership. *See, e.g., Cherokee Intermarriage Cases*, 203 U.S. 76, 83 (1906) ("The laws and uses of the Cherokees . . . show that citizenship rested on blood *or marriage*."); *see also*, American Indian Policy Review Comm'n, 95th Cong., 1st Sess., Final Report 108-09 (1977) (recognizing that certain tribes permit any descendent of a tribal member to be enrolled regardless of blood quantum, and that other tribes allow members to count Indian blood from other tribes for their minimal requirements). One is left wondering how Petitioner would explain a Cherokee with blond hair and blue eyes or, for example, a black Seminole. Furthermore, there are many people with a high degree of Indian blood who are deprived of membership, simply because they do not meet certain *political* criteria. The point is that tribal membership, for tribal purposes, is strictly an *intra-tribal* concern. *Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("A tribes right to define its own membership for tribal purposes has long been recognized as central to its existence."); *see also, Cherokee Intermarriage Cases at* 95; *Roff v. Burney*, 168 U.S. 218, 222 (1897). If there are any racial components to membership, they are imposed by the tribes themselves, not the federal government. Tribal membership, and the criteria imposed by the tribes, have absolutely nothing to do with federal recognition, generally, or the exercise of tribal sovereign immunity. After all, we are not discussing individual Indian immunity derived from a federal statute.

granted tax immunity); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (same); *Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966); *affirming* 244 F. Supp. 808 (E.D. Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams*, 358 U.S. 217 (tribal courts and their jurisdiction over reservation affairs). *Cf. Morton v. Ruiz*, 415 U.S. 199 (1974) (federal welfare benefits for Indians "on or near" reservation). Thus, even if sovereign immunity were merely a "federal benefit," it too would be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* at 555.[11]

Obviously, since Petitioner's "sovereign immunity preference," even if it existed by virtue of federal law, would be based on the unique political relationship between tribes and the federal government, not racial classifications, this Court's decision in *Adarand* is not implicated (notwithstanding the fact that the precise contours of *Adarand*, a split opinion with no majority reasoning, remain unexplored *even in the non-tribal context*). In

---

[11] Such special treatment is particularly appropriate, for as Justice Marshall wrote, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation*, 30 U.S. at 22. Congress is charged with regulating all commerce "with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Furthermore, the federal government owes a trust responsibility to the tribes, which is based on the very relationship that Petitioner now invokes to the Tribe's detriment. *See, e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Morton*, 417 U.S. at 555 (discussing "Congress' unique obligation toward the Indians"). "It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined." *Id.* at 553.

sum, there is no conflict between *Morton* and *Adarand* for three primary reasons. First, there is no federal statute creating tribal sovereign immunity from suit; such immunity exists as an incident of inherent tribal sovereignty. Second, even if there were such a statute in issue, because sovereign immunity is not available to individual Indians, but only to Indian tribes *as governments*, it would not fall within the ambit of conduct requiring strict judicial scrutiny. Finally, there is no conflict between this Court's edict in *Adarand* and the holding in *Morton*, for the sovereign immunity of Indian tribes would not be based on race, but rather on the exercise of powers of self-government. The purported conflict is nothing more than a back-door attack on tribal sovereignty, and is entirely without merit.

V. THE MINNESOTA SUPREME COURT'S ORDER, RECOGNIZING THAT THE COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ABROGATE THE TRIBE'S IMMUNITY, DID NOT CONSTITUTE "STATE ACTION" FOR PURPOSES OF EQUAL PROTECTION ANALYSIS.

The Equal Protection Clause of the United States Constitution limits state action, it does not *prompt* state action. *See Sloan v. Lemon*, 413 U.S. 825, 834 (1973) ("The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."). If not for Petitioner's misdirected claim, the state courts, and thus the state, would have had nothing to do with this dispute. LSI never asked the courts to enforce its immunity through any "affirmative act." *Compare Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

In *Shelley*, the Court held that state judicial enforcement of otherwise private restrictive covenants, which explicitly discriminate against non-whites, is state action for purposes of equal protection analysis. 334 U.S. at 20. The distinctions between *Shelley* and the present case are obvious. The Court made it clear that it was the *active judicial enforcement* of the restrictive covenants that violated equal protection. *Id.* at 19 ("[B]ut for the active intervention of the state courts . . . petitioners would have been free to occupy the properties in question without restraint."). The Court noted that "these are not cases in which the States have merely abstained from action . . . , leaving private individuals free to impose such discriminations. . . . Rather, these are cases in which the States have made available to such individuals the full coercive power of government. . . . " *Id.*

The present case, by contrast, *is* one in which the state has "merely abstained from action." The Minnesota Supreme Court recognized that state courts did not have jurisdiction to entertain Petitioner's suit. *See* Order of the Minnesota Supreme Court (Petition A-1, affirming appellate Court's affirmance of trial court's dismissal). The "full coercive power of government" was never invoked. While LSI would have preferred that the state courts were not involved at all (even to determine their lack of jurisdiction), it is *Petitioner* that asked the courts to assert their "coercive" power by *abrogating* the Tribe's immunity. That is not within any court's domain. *See Santa Clara Pueblo*, 436 U.S. at 58 (recognizing that " 'without *congressional* authorization,' the 'Indian Nations are exempt from suit' ") (emphasis added).

CONCLUSION

"The Court has consistently recognized that Indian tribes *retain* 'attributes of sovereignty over both their members and their territory.' " *Cabazon Band of Mission Indians*, 480 U.S. at 207 (emphasis added), *quoting Mazurie*, 419 U.S. at 557. The Court has also consistently held that Congress must be explicit in its intent to divest Indian tribes of their inherent sovereign authority. *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *Bryan*, 426 U.S. at 392-93. Specifically, when Congress seeks to divest tribes of their inherent sovereign immunity from unconsented suit, it must do so expressly and without equivocation. *Santa Clara Pueblo*, 436 U.S. at 58. Petitioner has not even attempted to show that Congress has divested the Tribe, and thus LSI, of its inherent immunity from suit in the present case.

Rather, Petitioner's claims (and the equally misguided dissenting Minnesota Court of Appeals opinion that appears to have spawned them) rest on the assumption that tribal sovereignty has been *completely* divested by fiat and circumstance. Thus, according to Petitioner, *every* exercise of self-government is nothing more than an exercise of delegated federal authority. Attempts to undermine tribal sovereignty have persisted throughout this Nation's history. It seems apparent, though, that as a few tribes begin to improve their circumstances and actually *succeed* at self-governance, those attempts are becoming more creative and deleterious than ever.

The flaws in Petitioner's arguments are numerous and self-evident. In sum, neither *Morton* nor *Adarand* apply to the present facts. Even if tribal sovereignty were

nothing more than a federal affirmative action program, however, the Court's sound reasoning in *Morton* would control. Furthermore, a state court can abstain from abrogating tribal sovereignty without implicating an entirely separate equal protection analysis. And finally, there is no conflict among the courts, as the issues presented by the Petition have never before been raised and addressed, even in the courts below. The law is clear, and the Petition should be denied.

July 9, 1997

Respectfully submitted,

STEVEN F. OLSON,
Counsel of Record

BLUEDOG, OLSON & SMALL, P.L.L.P.
Southgate Office Plaza, Suite 500
5001 West 80th Street
Minneapolis, Minnesota 55437
Telephone (612) 893-1813

Attorney for Respondent

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SCOTT — FIRST JUDICIAL DISTRICT
(Filed Mar. 31, 1995) — Case Type: Personal Injury

Sylvia Cohen,
Plaintiff,

vs.

Little Six, Inc., d/b/a
Mystic Lake Casino,
Defendant.

File No. C-95-01701
ORDER AND JUDGMENT

The above-entitled matter came on for hearing before the Honorable Michael A. Young, Judge of District Court, on the 29th day of March, 1995, at the Scott County Courthouse, Shakopee, Minnesota. The matter was before the Court on Defendant's motion to dismiss the complaint for lack of jurisdiction.

Plaintiff was represented by Clinton Collins, Jr., Attorney at Law, of Collins & Associates, P.A., Suite 2500F, Foshay Tower, 821 Marquette Avenue, Minneapolis, MN 55402. Defendant was represented by Joseph Plummer, Attorney at Law, of McDonough, Wagner & Sherry, P.A., 14501 Granada Drive, Suite 200, Apple Valley, Minnesota 55124.

Based upon the files, records, arguments of counsel, and all the proceedings herein, the Court makes the following:

ORDER

1. That Defendant's motion to dismiss the complaint pursuant to Minn. R. Civ. P. 12.02(a) is granted. Defendant is immune from liability pursuant to the doctrine of sovereign immunity and therefore Plaintiff's lawsuit is dismissed with prejudice.

2. That the attached memorandum is hereby incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 31, 1995.

BY THE COURT:

/s/ Michael A. Young
Michael A. Young
Judge of District Court

JUDGMENT

I hereby certify that the above Order shall constitute the Judgment of this Court.

Dated: March 31, 1995.

Court Administrator
By: /s/ Margaret A. Born
Deputy

MEMORANDUM

Sylvia Cohen, Plaintiff, alleges that on October 7, 1994, at approximately 4:30 p.m., she was at the Mystic Lake Casino in Prior Lake. While at the Casino she attempted to sit down on a stool in front of one of the slot machines. As she did so it swiveled from underneath her and she fell to the floor. As a result of the fall the Plaintiff was injured and required hospitalization and medical care. On February 13, 1995, Plaintiff filed suit against Defendant alleging that Defendant was negligent in utilizing swivel seating that snaps back. Defendant now asks the Court to dismiss the complaint pursuant to Minn. R. Civ. P. 12.02(a) subject matter jurisdiction, 12.02(b) personal jurisdiction and 12.02(c) failure to state a claim, on the grounds that the suit is barred by the doctrine of sovereign immunity.

Defendant's motion asks that the case be dismissed for lack of subject matter jurisdiction. Subject matter jurisdiction refers to the limitations on the courts authority to hear certain matters. These limitations are placed on a court by statute and the constitution. Jurisdiction of the subject matter is an absolute prerequisite for the continuation of an action and, absent it, the court must dismiss the action. *Morison v. Morison,* 408 F.Supp. 315 (D.C.Tex. 1976).

Minn. R. Civ. Proc. 12.02(a) permits a party to raise subject matter jurisdiction as a defense to a suit. The issue of sovereign immunity is a jurisdictional issue and must be resolved without reaching the merits of the case. *State Board of Medical Examiners v. Olson,* 206 N.W.2d 12 (Minn. 1973); *Pan Am Co. v. Sycuan Band of Mission Indians,* 884

F.2d 416 (9th Cir. 1989). Therefore, Plaintiff's argument that the matter cannot be dismissed because an issue of material fact remains incorrectly uses the summary judgment standard.

The fact that matters outside the pleadings have been considered in making the jurisdictional determination did not convert this into a summary judgment motion. *See, e.g. Osborne v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (disputed issues of material fact will not prevent the trial court from deciding for itself merits of jurisdictional claims). The court will accordingly consider material outside the pleadings to the extent necessary to determine subject matter jurisdiction. *Dou Yee Enterprises PTE, Ltd. v. Advantek, Inc.*, 149 F.R.D. 185, 187 (D. Minn. 1993).

Matters outside the pleadings submitted to the Court include portions of the Shakopee Mdewakanton Sioux Community's Corporate Ordinances, Articles of Incorporation of Little Six, Inc., copies of six decisions on the same issue by Scott County District Court Judges Menke, Howe, Fitzgerald, Young, and Atkins, the tribal-state compact on class III blackjack, the tribal-state compact on class III video games, and a copy of 25 U.S.C.A. §§ 2701 – 2721.

Defendant corporation is owned by the Shakopee Mdewakanton Sioux Community (Community). The Community is a federally recognized Indian tribe operating under a constitution approved by the Secretary of the Interior and pursuant to the Indian Reorganization Act of

1934. 25 U.S.C. § 476. The casino where the alleged negligence occurred is located on land held in trust for the Community by the United States.

Public Law 280 (28 U.S.C. 1360(a)) provides that states "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such state has jurisdiction over other civil causes of action, * * * " Those Indian countries included within Minnesota are "(a)ll Indian country within the State, except the Red Lake Reservation." *Id.* Therefore the Shakopee Community is subject to the jurisdiction of the Court. However, this does not mean that the Defendant is precluded from raising the defense of sovereign immunity.

Public Law 280 has been interpreted as not granting to the state courts full power to adjudicate disputes involving Indian tribes.

> In Concluding that Public Law 280 did not subordinate tribal government to the "full panoply of civil regulatory power" of state governments, the U.S. Supreme Court likewise stated "[t]he Act itself refutes such an inference; there is notably absent any conferral of state jurisdiction over the tribes themselves * * * . [I)f Congress in enacting Public Law 280 had intended to confer upon the States general civil regulatory powers * * * it would have expressly said so.

Tibbetts v. Leech Lake Reservation Business Committee, 379 N.W.2d 883, 887 (Minn. 1986) citing *Bryan v. Itasca County*, 426 U.S. 373, 388-89, 390, 96 S.Ct. 2102, 2111-12, 48 L.Ed.2d 710, __ (1976).

A long line of cases limits the power of state courts over a suit brought against a federally recognized Indian tribe. These cases recognize Indian tribes as sovereigns with the inherent authority to protect their sovereignty. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Commission v. Potawatomi Tribe*, 112 L.Ed.2d 1112, 1119 (1991). The Shakopee Mdewakanton Community, as a federally recognized tribe, has the right to exercise the power of sovereign immunity.

This immunity extends to corporations or other entities owned by the tribe, unless waived. *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). A review of the documents submitted by the Community shows that no general waiver by the Community has been given. The Articles of Incorporation of Little Six, Inc., dated March 18, 1991, provides in Article 3.1 that:

> The Shakopee Mdewakanton Sioux Community confers on the Corporation all the Community's rights, privileges and immunities concerning * * * sovereign immunity from suit, to the same extent that the Community would have such rights, privileges and immunities, if it engaged in the activities undertaken by the Corporation * * * "

Article 3.2 provides:

> The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Community or another court of competent jurisdiction * * *

The Community has specifically retained sovereign immunity on behalf of the corporation. In order for Plaintiff to maintain her suit it would be necessary for the Community to waive this immunity. This the Community has specifically refused to do as shown in their Articles of Incorporation, and by its actions in contesting this suit. Furthermore, the actions of the Community in operating the casino and inviting the public onto its land cannot imply a waiver. Any waiver must be "unequivocally expressed" and not implied. *See Santa Clara Pueblo,* 436 U.S. at 58.

Plaintiff, relying on *McCarthy & Assoc. v. Jackpot Junction,* 490 N.W.2d 156 (Minn. App. 1992), argues that Defendant has waived its sovereign immunity by the Community's inclusion of a "sue and be sued" clause in its tribal corporate charter. In *McCarthy* the exact language used by the Lower Sioux Reservation in its corporate charter was "(t)he Community * * * shall have the following corporate powers * * * (i) To sue and be sued in the courts of competent jurisdiction within the United States." *Id.* at 158. This provision is similar to Article 3.2 of the Mdewakanton Community's corporate charter, but it is not identical. The difference however is significant. It states "The corporation shall have the power to sue and is authorized to consent to be sued * * * ." Any waiver expressed in the Shakopee provision is contingent on

authorization and is, therefore, not an express waiver but only a provision by which the Community can grant a waiver. This is significantly different from the language used in *McCarthy,* which expressly states the Lower Sioux tribe can be sued. Clearly the Mdewakanton grant of corporate power is not the waiver of sovereign immunity alleged by the Plaintiff. The Mdewakanton Community only authorized its corporate board to consent to be sued. Without this authorization the Community retains its sovereign immunity.

Plaintiff also argues that under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701 – 2721, the Community and the State entered into a tribal-state compact in which the Community agreed to "conduct (the operation) in a manner which adequately protects the environment and the public health and safety." Therefore, Plaintiff concludes that since the Community engages in gaming pursuant to the IGRA, that the Defendant has expressly waived its immunity.

The Community and the State of Minnesota did enter into two pacts. One for the control of Class III video games of chance was executed on October 20, 1989, and the other for the control of class III blackjack was executed on June 12, 1991. The IGRA and the compacts do permit for state inspection and control of gaming activities on tribal land. However, the Court disagrees with Plaintiff's broad interpretation of the IGRA. Nowhere in the Act does it grant state courts jurisdiction over personal injury actions allegedly caused by violations of the IGRA. The remedies available through the Act are civil fines, temporary closure and permanent closure of the

facility. 25 U.S.C. 2713. There are no provisions for recovery of personal injury damages in a private cause of action. This conclusion is consistent with the decision in *Ross v. Flandreau Santee Sioux Tribe,* 809 F.Supp. 738, 745 (D.S.D. 1992), where the Court held that while the IGRA gives the court authority to enforce the Act, sovereign immunity protects the tribe from monetary damages. The IGRA does not waive the Community's sovereign immunity with regard to this suit for damages.

Plaintiff asserts that allowing the Community to use the defense of sovereign immunity violates her constitutional right to due process of the law. She argues that dismissal will deprive her of her "day in court." This may be true. However, Plaintiff's assertion that she has been deprived of her constitutional right to due process is fundamentally flawed. The federal and state due process guarantees are designed to protect the people from state action. If there is no state action then there can be no due process violation. The due process clause does not protect citizens from actions by private citizens. *Adickes v. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (the Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful). This analysis is applicable to Indian tribes.

Indian tribes are considered private citizens for purposes of the Fourteenth Amendment. The action by the Defendant in exercising its sovereign immunity is not state action. In *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967), the plaintiffs alleged that certain statutes, rules and regulations were not followed in an election. One of the plaintiff's arguments was that dismissal based on sovereign

immunity deprived them of due process of law. The Eighth Circuit Court of Appeals rejected this argument on the basis of lack of state action.

> This argument ignores one of the most basic tenets of American Constitutional law. The guarantees of the Due Process Clause relate solely to action by a state government, and have no application to actions of Indian tribes, acting as such.

Id. at 533, (citations omitted). Plaintiff's suit is directed against the Mdewakanton Community and there has been no showing of any state action. Therefore, Plaintiff is entitled to no relief under the Fourteenth Amendment.

Unfortunate as it maybe, Plaintiff cannot sue the Defendant without its permission. Since permission has not been given and no waiver is present, Plaintiff's suit is barred by the doctrine of sovereign immunity. It is not within the power of this Court to modify this reality, even for a sympathetic victim. Congress granted Indian tribes immunity, and only Congress can waive or modify the immunity.

Because the sovereign immunity defense disposes of this matter, the Court did not address Defendant's personal jurisdiction or failure to state a claim defenses.

M.A.Y.

STATE OF MINNESOTA

COUNTY OF SCOTT

DISTRICT COURT

FIRST JUDICIAL DISTRICT

Sylvia Cohen,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake Casino,

Defendant[s].

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. 95-01701

Date of Order: March 31, 1995

To: Clerk of the Appellate Courts
Mr. Frederick K. Grittner
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Please take notice that the above-named plaintiff appeals to the Court of Appeals of the State of Minnesota from an order of the court entered on the date shown, granting defendant's motion to dismiss.

Dated: April 28, 1995

Joseph Plumer
McDonough, Wagner & Sherry, P.A.
Attorney For Defendant Little Six, Inc.
14501 Granada Drive, Suite 200
Apple Valley, MN 55124
Telephone: (612) 431-1222

Clinton Collins, Jr.
Clinton Collins & Associates, P.A.
Attorney For Plaintiff Sylvia Cohen
Suite 2500F, Foshay Tower
821 Marquette Avenue South
Minneapolis, MN 55402
Telephone: (612) 373-0991
/s/ Clinton Collins, Jr.

STATE OF MINNESOTA
IN COURT OF APPEALS

Sylvia Cohen,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake Casino,

Defendant[s].

STATEMENT OF THE CASE OF APPELLANT

Trial Court Case No. 95-01701
Date of Order: March 31, 1995

1. This case originated in Scott County District Court, the Honorable Michael A. Young presiding.

2. This appeal is from an Order, entered on March 31, 1995. However, Defendant/Respondent failed to provide written notice of the Order. Appellant appeals from the Scott County District Court Order pursuant to *Minn R. Civ. App. P. 103.03(e).*

3. This Appeal stems from litigation based in Tort.

4. Appellant alleges that Respondent, a Federally recognized Indian Tribal Corporation, had a duty of care to maintain, inspect, oversee and operate its premises, and was negligent in providing a safe gaming facility. As a result, Appellant fell on Respondent's premises, and as a direct and proximate result of Respondent's negligent maintenance of its premises, sustained severe and very likely permanent injuries.

   Appellant asserts sovereign immunity from suit.

   The Honorable Michael A. Young granted Appellant's Motion to Dismiss, in that sovereign immunity bars suit against Defendant.

5. The issues raised on appeal will include the following: (1) Whether Congress' codification of the Indian Gaming Regulatory Act, coupled with the Tribal-State Compacts between the Shakopee Mdewakanton Dakota Sioux Community and the Certificate of Authority to Transact Business in the State of Minnesota under Minn. Stat. § 303.01, acts as a clear waiver of sovereign immunity, with respect to requirements of the Indian Gaming Regulatory Act, specifically, the Respondent's duty to construct, operate and maintain it's facility to insure the public health and safety; and (2) Whether sovereign immunity in this suit violates Appellant's guarantees of substantive due process under the United States Constitution.

6. A full transcript from the District Court is required.

7. Oral argument is requested.

8. Formal briefs are necessary.

9. Joseph Plumer
McDonough, Wagner & Sherry, P.A.
Attorney for Respondent little Six, Inc.
14501 Granada Drive, Suite 200
Apple Valley, MN 55124
(612) 431-1222

Clinton Collins, Jr.
Clinton Collins & Associates, P.A.
Attorney for Appellant Sylvia Cohen
Suite 2500F, Foshay Tower
821 Marquette Avenue South
Minneapolis, MN 55402
(612) 373-0991

DATED: April 28, 1995

Clinton Collins & Associates, P.A.

/s/ Clinton Collins, Jr.
Clinton Collins, Jr., ID# 192685
Attorney for Appellant Sylvia Cohen
Suite 2500F, Foshay Tower
821 Marquette Avenue South
Minneapolis, MN 55402
(612) 373-0991

Appellate Case No.: C6-95-928

STATE OF MINNESOTA
IN SUPREME COURT

Sylvia Cohen,	§	
Plaintiff,	§	**PETITION FOR REHEARING**
Petitioner.	§	
v.	§	APPELLATE COURT CASE No.: C6-95-928
Little Six, Inc., d/b/a Mystic Lake Casino,	§	
Defendant,	§	
Respondent.	§	

Clinton Collins, Jr.
Attorney I.D. No. 192685
CLINTON COLLINS & ASSOCIATES, P.A.
821 Marquette Avenue, Suite 2500F
Minneapolis, MN 55402
(612) 373-0991

and

Gregory A. Abbott
Attorney I.D. No. 209491
ABBOTT & BARUCH, LTD.
Offices at Centre Village
431 So. Seventh Street, Suite 2424
Minneapolis, MN 55415
(612) 399-0272

Attorneys for Petitioner

Steven F. Olson
Attorney I.D. No. 230856
Janet Erickson
Attorney I.D. No. 257710
BLUEDOG, OLSON & SMALL, P.L.L.P.
5001 West 80th Street, Suite 670
Minneapolis, MN 55437
(612) 893-1813

Attorneys for Respondent

Pursuant to Rule 140.01(c), Minnesota Rules of Civil Appellate Procedure, Petitioner Sylvia Cohen ("the Petitioner") respectfully moves this court for rehearing and argument, because the Court has failed to consider or overlooked material questions in the case.

This Court, by Order dated January 21, 1997, summarily dismissed Petitioner's appeal on grounds that its decision in *Gavle v. Little Six, Inc., d/b/a Mystic Lake Casino,* 555 N.W.2d 284 (Minn. 1996), was controlling. However, in this appeal the Court granted review on material issues which were *not* resolved in *Gavle.*

In the interests of justice Petitioner's Motion for Rehearing should be granted, and issues omitted and overlooked by this Court should be fully briefed and argued.

ARGUMENT

A simple syllogism demonstrates that this Court has overlooked and/or failed to consider Petitioner's constitutional issues, within the meaning of Rule 140.01(c):

- This Court granted review of Petitioner's constitutional claims;
- This Court dismissed Petitioner's appeal on grounds that *Gavle* is controlling;
- *Gavle* does not address Petitioner's constitutional claims;
- Therefore, Petitioner's constitutional claims have been overlooked or omitted.

I. *GAVLE* DOES NOT CONTROL OR ADDRESS PETITIONER'S CONSTITUTIONAL CLAIMS

This Court's decision in *Gavle* did not address or resolve three constitutional issues Petitioner raised in her Petition for Review. The constitutional issues raised by Petitioner are as follows:

(1) Does tribal sovereign immunity violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to U.S. Constitution;

(2) Are Petitioner's Due Process rights violated by requiring her to proceed in procedurally and constitutionally deficient tribal courts;

(3) Whether the rule established in *Shelley v. Kraemer,* 334 U.S. 1, bars courts from enforcing racially discriminatory covenants in corporate charters granted by Indian tribes.

See Petition for Review, at 1. *Gavle*, by contrast, did not even purport to consider constitutional questions. The *Gavle* opinion addressed only the following issues:

(1) whether Minnesota state courts have jurisdiction to consider the defense of Indian tribal sovereign immunity (holding that jurisdiction does exist); *see Gavle,* at 292;

(2) whether Little Six, Inc., ("LSI") a corporation formed by an Indian tribe, is entitled to assert the tribe's sovereign immunity as a defense (holding that LSI is entitled to assert sovereign immunity); *Id.*, at 296;

(3) whether LSI had waived its defense of sovereign immunity (holding that LSI had not waived sovereign immunity); *Id.*, at 297-98.

Petitioner concedes that *Gavle* controls and disposes of the three non-constitutional grounds for review cited in her petition. *See* Petition for Review, Issues 1(d), 1(e), and 1(f), at 1-2. However, there is nothing in *Gavle*, not even *obiter dicta*, which address her constitutional claims. *Id.*, at 1 (Issues 1(a), 1(b), and 1(c)).

II. PETITIONER'S CONSTITUTIONAL CLAIMS WERE PROPERLY BEFORE THE COURT

This Court's own prior acts preserved Petitioner's constitutional issues for review. Respondent moved to strike the constitutional claims asserted by Petitioner after service of the Petition for Review, *see* Respondent's Motion to Strike, dated April 1, 1996, at 1. The ground for the Motion to Strike was the incorrect claim that the constitutional claims had not been properly asserted in the courts. Petitioner filed a vigorous Response to the Motion to Strike on April 9, 1996. By Order of April 12, 1996, this Court denied the Motion to Strike, and granted review of the decision of the Court of Appeals.

In that Order, review was granted of *all* issues raised by Petitioner. *See* Order, dated April 12, 1996. Had the Court believed that the constitutional claims were not proper on appeal, it could have (and should have) granted review only for the non-constitutional issues, now resolved by *Gavle*. Denial of Respondent's Motion to

Strike, while granting review of all issues raised by Petitioner, shows unequivocally that Petitioner's constitutional claims were squarely before the Court.[1]

III. CONCLUSION

Deciding this case on the basis of *Gavle* is a fundamental error. The *Gavle* opinion is limited to non-constitutional questions of jurisdiction, the ability of a corporate defendant to assert sovereign immunity, and waiver. Unlike the petitioner in *Gavle,* the petitioner in this case has raised and pursued constitutional challenges to the exercise of tribal sovereign immunity. These are important questions which deserve the full consideration of this Court.

Petitioner Sylvia Cohen thus respectfully requests that this Court grant her Motion for Rehearing, and fully consider the constitutional claims which have been overlooked or omitted.

Dated: January 30, 1997.

---

[1] The parties fully contested the validity of appealing on constitutional grounds in connection with Respondent's Motion to Strike, and Petitioner will not needlessly repeat these arguments herein. However, *res judicata* would bar Respondent from raising this issue again, on the ground that the Court decided the issue in its denial of Respondent's Motion to Strike and by accepting review of all issues raised by Petitioner without qualification.

CLINTON COLLINS & ASSOCIATES, P.A.

By: /s/ Clinton Collins (by Ga)
Clinton C. Collins, Jr.
Atty Reg. #192685
Suite 2500F, Foshay Tower
821 Marquette Avenue South
Minneapolis, Minnesota 55402
(612) 373-0991

-and-

ABBOTT & BARUCH, LTD.

By: /s/ Gregory Abbott
Gregory A. Abbott
Atty Reg. #209491
2424 Centre Village
431 South Seventh Street
Minneapolis, Minnesota 55415
(612) 399-0272

Attorneys for Petitioner Sylvia Cohen

STATE OF MINNESOTA
IN SUPREME COURT

Sylvia Cohen,	§	
Plaintiff,	§	**PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS**
Petitioner.	§	
v.	§	APPELLATE COURT CASE NUMBER: C6-95-928
Little Six, Inc., d/b/a Mystic Lake Casino,	§	
Defendant,	§	Date of Filing of Decision by Court of Appeals: FEBRUARY 13, 1996
Respondent.	§	

Clinton Collins, Jr.
Attorney I.D. No. 192685
CLINTON COLLINS & ASSOCIATES, P.A.
821 Marquette Avenue, Suite 2500F
Minneapolis, MN 55402
(612) 373-0991

and

Gregory A. Abbott
Attorney I.D. No. 209491
ABBOTT & BARUCH, LTD.
Offices at Centre Village
431 So. Seventh Street, Suite 2424
Minneapolis, MN 55415
(612) 333-6691

Attorneys for Petitioner

Steven F. Olson
Attorney I.D. No. 230856
BLUEDOG, OLSON & SMALL, P.L.L.P.
5001 West 80th Street, Suite 670
Minneapolis, MN 55437
(612) 893-1813

and

Joseph Plumer
Attorney I.D. No. 164589
McDONOUGH, WAGNER & SHERRY, P.A.
14501 Granada Drive, Suite 200
Apple Valley, MN 55124
(612) 431-1222

Attorneys for Respondent

TO: The Supreme Court of the State Minnesota

Petitioner Sylvia Cohen ("Petitioner") requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Statement of Legal Issues and Resolution by the Court of Appeals

(a) ***Whether sovereign immunity for Indian tribes is a legal fiction which should be discarded because it constitutes racial discrimination in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment?***

The Court of Appeals rejected Petitioner's constitutional objections, allowing Respondent to deny legal liability on the grounds of sovereign immunity. Opinion at 4; App. "A." *But cf.* Opinion at D-2 to D-28, and D-60 to D-64, App. "A" (Randall, J., dissenting)

(b) ***Whether Petitioner's Due Process rights were violated by limiting her judicial remedies to tribal "courts" lacking procedural or constitutional safeguards?***

The Court of Appeals found no due process violation in requiring Petitioner to litigate her claims in tribal court. Opinion at 11, App. "A." *But cf.* Opinion at D-28 to D-40, App. "A" (Randall, J., dissenting).

(c) ***Whether the Fourteenth Amendment, as interpreted by* Shelley v. Kraemer, *334 U.S. 1 (1948), bars courts from enforcing racially discriminatory provisions in the Articles of Incorporation granted by an Indian tribe to a corporation?***

The Court of Appeals presumably found no Fourteenth Amendment violation in judicial enforcement of racial discrimination, as it failed to address this issue raised by Petitioner.

(d) ***Whether Minnesota courts have jurisdiction over civil tort claims against Indian corporations arising on Indian reservations?***

The Court of Appeals held it had no subject matter jurisdiction over Petitioner's claims. Opinion at 9-11, App. "A." *But cf.* Opinion at D-3 to D-4, App. "A" (Randall, J., dissenting).

(e) ***Is an Indian corporation entitled to assert the defense of sovereign immunity?***

The Court of Appeals held Respondent, a corporation chartered by the Shakopee Mdewakanton Sioux Community of Minnesota ("the Tribe"), was entitled to assert the Tribe's defense of sovereign immunity. Opinion at 6, App. "A."

(f) *Has Respondent waived the defense of sovereign immunity?*

The Court of Appeals held that Respondent had not waived the defense of sovereign immunity. Opinion at 6-8, App. "A."

2. Criteria and Reasons Supporting the Petition for Review

Pursuant to Rule 117, MINN. R. CIV. APP. P., the following criteria and reasoning support this petition for discretionary review:

(1) the questions presented are important and are issues which the Supreme Court should review. The use of sovereign immunity as a defense by Indian gambling corporations raise vital questions of constitutional law, jurisdiction, and fundamental fairness;

(2) the severe injustice done to Petitioner requires correction by the Supreme Court;

(3) a decision by the Supreme Court will harmonize and stabilize the law in light of the erroneous decision made by the Court of Appeals; and

(4) the questions presented have a statewide impact, and are likely to recur.

3. Statement of the Case

In October 1994, Petitioner Sylvia Cohen, 83 years old, went to Mystic Lake Casino. While there she suffered severe and permanent injuries. She filed a personal injury

lawsuit in Scott County District Court on February 7, 1995, against Respondent, the owner and operator of the casino. On March 31, 1995, the Scott County District Court granted Respondent's motion to dismiss pursuant to Rule 12, MINN. R. CIV. P., on grounds of sovereign immunity.

On February 13, 1996, the Court of Appeals affirmed the dismissal of Petitioner's complaint by the Scott County District Court.

4. Argument

Numerous errors in the opinion of the Court of Appeals require review and correction by the Minnesota Supreme Court. These errors are as follows:

A. SOVEREIGN IMMUNITY FOR INDIAN TRIBES VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION

Indian sovereign immunity is on its face an invalid racial preference which, as applied by the Court of Appeals, denies Petitioner due process of law. *See* Opinion at D-60 to D-64 (Randall, J., dissenting). Congress, by statute, has plenary power regarding the scope of sovereign immunity for Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). However, all federal racial preferences must be analyzed under "strict scrutiny" to see if they serve a "compelling governmental interest" and they must be "narrowly tailored" to serve

that interest. *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S. Ct. 2097, 63 U.S.L.W. 4523, 4533 (1995).

Indian sovereign immunity fails to meet the *Adarand* test. The increasing prosperity of Indian tribes as a result of gambling eliminates any compelling governmental interest in protecting tribal assets. Additionally, the broad limitation on liability resulting from sovereign immunity is certainly not "narrowly tailored" to meet a compelling governmental interest.

Further, Petitioner's due process has been violated because Indian sovereign immunity deprives her the guarantee of a remedy at law. **Nothing prevents Respondent from asserting the defense of sovereign immunity in its own tribal courts.** Thus, unless Petitioner has a remedy in Minnesota courts, she has no remedy at all.

Lastly, Indian sovereign immunity is an anachronistic doctrine which no longer deserves the respect of law, because it is an inherent violation of Petitioner's due process rights. *See* Opinion at D-44 (Randall, J., dissenting). *Compare Lambert v. Ryozik*, 268 Mont. 219, 886 P.2d 378 (1994) (refusal to hear case arising an Indian land violated plaintiff's due process rights)

The Court of Appeals' failure to give any weight to the Due Process and Equal Protection clauses of the United States Constitution requires review so that this error may be corrected.

B. TRIBAL COURTS ARE NOT A CONSITITIONALLY ACCEPTABLE ALTERNATIVE TO JUDICIAL PROCEEDINGS IN STATE DISTRICT COURT

There is no independent constitutional basis for the Tribe's tribal courts. *See* Constitution of the Tribe, App. "B." Because tribal courts lack constitutional status, their decisions can be ignored or overturned at whim by the Tribal Council. There is nothing in the record indicating that tribal judges possess acceptable legal training or expertise.

The Court of Appeals therefore committed reversible error when it forced Petitioner to pursue her claims in tribal court, denying her due process of law. *See* Opinion at D-28 to D-40 (Randall, J., dissenting).

C. THE FOURTEENTH AMENDMENT BARS JUDICIAL ENFORCEMENT OF DEFENDANT'S CORPORATE CHARTER ALLOWING IT TO USE SOVEREIGN IMMUNITY AS A DEFENSE AGAINST NON-INDIANS

By virtue of its Articles of Incorporation, Respondent is absolutely immune from suit against a certain class of persons, a class defined ***solely*** by its racial composition. *See* Constitution of the Tribe, art. II, App. "B" (membership in the Tribe defined by race); and Respondent's Restated Articles of Incorporation § 3.1, App. "C" (sovereign immunity applies only to non-members of the Tribe).

The decision of the Court of Appeals thus constitutes state action ratifying and validating racial discrimination,

and as such violates the provisions of the Fourteenth Amendment. *See Shelley v. Kraemer,* 334 U.S. 1 (1948).

D. MINNESOTA COURTS HAVE JURISDICTION

See Public Law 280, 28 U.S.C. § 1360 (1988); *Williams v. Lee,* 358 U.S. 217, 220 (1959). *See also Lambert, supra.* The Court of Appeals' contrary holding is clear error.

E. LITTLE SIX IS NOT ENTITLED TO ASSERT THE DEFENSE OF SOVEREIGN IMMUNITY

As a corporate entity, Respondent is not entitled to assert the Tribe's sovereign immunity or absence of jurisdiction as a defense to Petitioner's claim. *See Gavle v. Little Six, Inc.,* 534 N.W.2d 280, 284-85 (Minn. App. 1995), *review granted* (Sept. 28, 1995).

The Court of Appeals' decision to allow a non-governmental entity to assert the defense of sovereign immunity is reversible error and requires correction by the Supreme Court.

F. LITTLE SIX HAS WAIVED THE DEFENSE OF SOVEREIGN IMMUNITY

Waiver exists through knowing submission by Respondent to the laws of Minnesota.

5. Conclusion

For these reasons, Petitioner seeks an order granting review of the decision of the Court of Appeals.

Dated: March 12, 1996 *Attorneys for Petitioner Sylvia Cohen*

CLINTON COLLINS & ASSOCIATES, P.A.

By: /s/ Clinton Collins, Jr.
Clinton C. Collins, Jr.
Atty Reg. # 192685
Suite 2500, Foshay Tower
821 Marquette Avenue South
Minneapolis, Minnesota 55402
(612) 373-0991

ABBOTT & BARUCH, LTD.

By: /s/ Gregory Abbott
Gregory A. Abbott
Atty Reg #209491
Offices at Centre Village
431 South Seventh Street, Suite 2424
Minneapolis, Minnesota 55415
(612) 333-6691

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Clinton Collins, Jr., of the City of Minneapolis, County of Hennepin in the State of Minnesota, being duly sworn, says that on March 12, 1996, he served the attached Petition For Review Of Decision Of Court Of Appeals on the following:

Steven F. Olson
Bluedog, Olson & Small, P.L.L.P.
5001 West 80th Street, Suite 670
Minneapolis, MN 55437

Joseph Plumer
McDonough, Wagner & Sherry, P.A.
14501 Granada Drive, Suite 200
Apple Valley, MN 55124

District Court Administrator
Scott County Courthouse
428 South Holmes Street
Shakopee, MN 55379

the attorneys for Little Six, Inc. d/b/a Mystic Lake Casino, the Defendant in this action, and the trial court administrator, by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota directed to said attorneys and trial court administrator, the last known address of said persons.

/s/ Clinton Collins, Jr.

Subscribed and sworn to before me this
12th day of March, 1996.

/s/ Marcia J. Mundhenk
Notary Public

My commission expires:

MARCIA J. MUNDHENK
NOTARY PUBLIC – MINNESOTA
HENNEPIN COUNTY
My Comm. Expires
Jan. 31, 2000

SL 1 1 PAGE 5 5

ORIGINAL

Supreme Court, U.S.
FILED
AUG 22 1997
CLERK

No. 96-1962

In the Supreme Court of the United States

October Term, 1996

Sylvia Cohen,

Petitioner,

vs.

Little Six, Inc., a foreign corporation,
d/b/a Mystic Lake Casino,

Respondent.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

Respondent's Motion for Rule 11 Sanctions

Steven F. Olson, *Counsel of Record*
BlueDog, Olson & Small, P.L.L.P.
Southgate Office Plaza, Suite 500
5001 West 80th Street
Minneapolis, Minnesota 55437
Telephone (612) 893-1813
ATTORNEY FOR RESPONDENT

10 pp

TO: Petitioner Sylvia Cohen and her attorney, Mr. Gregory A. Abbott, **Abbott & Baruch, Ltd.**; Offices at Centre Village, 431 So. Seventh Street, Suite 2424, Minneapolis, MN 55415.

PLEASE TAKE NOTICE that the above-named Respondent, pursuant to Rule 11 of the Federal Rules of Civil Procedure ("F.R.C.P."), hereby moves this Court for an order sanctioning Petitioner's attorney, Gregory A. Abbott, for asserting false statements of law to this Court, for making legal contentions that are unsupported by any statutory or decisional authority, and for misleading the tribunal. As sanctions, Respondent respectfully requests attorney's fees incurred in preparing this Motion, and attorney's fees incurred in preparing Respondent's Brief in Opposition to the Petition for a Writ of Certiorari.

DISCUSSION

As illustrated by the model rules, attorneys are generally prohibited from making "a false statement of . . . law to a tribunal." ABA Mod. R. Prof. Cond. 3.3(a)(1). Further, attorneys owe a duty of candor to federal tribunals, which requires them "to conduct a reasonable inquiry into the law . . ." before submitting a paper to a court. F.R.C.P. 11, 1993 Advisory Committee Notes. Rule 11 requires an attorney filing a pleading, motion or other paper with a tribunal to certify "that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, . . . [the] claims . . . and other legal contentions therein are warranted by existing law . . . ." F.R.C.P. 11(b)(2).

In the Petition, Counsel states as fact that "tribal sovereign immunity exists by virtue of Congressional action . . . . " Petition at 19. This is an outright

misstatement of existing law, as evidenced by the failure of Petitioner's counsel to provide *any* statutory or decisional authority for this assertion. The reason for failing to cite to a Congressional act or any case in support of this position is obvious - the statement is false, and absolutely *no authority* in support of this statement exists.

Since this misstatement of law is the foundation of all of Petitioner's arguments, it is clear that Petitioner's misstatement of law was deliberate and intended to mislead and confuse the Court. Petitioner argues that Congress "has established a statutory scheme permitting Indian tribes, and no other group, to assert sovereign immunity as a defense in all civil cases." Petition at 19. Consequently, Petitioner asserts that this Court must apply a strict level of scrutiny to determine if sovereign immunity is narrowly tailored to meet a compelling governmental interest. Petition at 19.

Tribal sovereign immunity does not exist by virtue of Congressional action, however. *See* Response to Petition. Rather, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted). Although tribal sovereign immunity is subject to the plenary control of Congress, Martinez, 436 U.S. at 58, tribal sovereign immunity was not *created* by Congress. Since Congress has not established a statutory scheme respecting tribal sovereign immunity, as Petitioner's counsel asserts, there is no basis

for review by a federal court of any congressional act in the context of this case. In short, there is nothing to which a strict scrutiny standard of review can be applied.

Either Petitioner's counsel completely ignored those portions of cases he cited that contain propositions in direct opposition to the argument he advanced (intentional misrepresentation of the law), or he failed entirely to read the cases cited (negligent misrepresentation of the law). For example, on the page that Petitioner's counsel cites for the proposition that "[t]ribal sovereign immunity exists by virtue of Congressional action," Rice v. Rhener states that "'[t]he sovereignty that the tribes *retain* is of a unique and limited character.'" 463 U.S. 713, 719 (1983) (emphasis added). Rice, in turn, quotes United States v. Wheeler, which states, also on the *exact page* Petitioner's counsel cites for the proposition that tribal sovereignty was conferred by Congress:

> But our cases recognize that the Indian tribes *have not given up* their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [T]hey are a good deal more than 'private, voluntary organizations.'" (internal citations omitted). The sovereignty that the Indian tribes *retain* is of a unique and limited character. . . . *But until Congress acts, the tribes retain their existing sovereign powers.*

435 U.S. 313, 323 (1978). Most remarkably, Petitioner's counsel cites the leading case recognizing the inherent nature of tribal sovereign immunity *for the opposite proposition*. Again, on the page cited by Petitioner's counsel, Santa Clara states that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." 436 U.S. 49, 58 (1978).

Elsewhere, Santa Clara recognizes that "Indian tribes are 'distinct independent political communities, *retaining* their original and natural rights' in matters of local self-government." Id. at 55 (emphasis added, internal citations omitted).

CONCLUSION

Petitioner's attorney violated his duty of candor to this Court by submitting a paper containing a clear misstatement of law. He then compounded this transgression of Rule 11 by constructing a legal argument based entirely on this intentional misstatement, thereby seeking to mislead the Court. There can be no doubt that Petitioner's counsel intentionally advanced an argument for which there is no support in the law, and for which ample decisional authority exists which directly contradicts the position advanced.

As an appropriate sanction, Respondent Little Six, Inc. requests attorneys fees incurred in preparing this Motion and in responding to Appellant's misstatement of law in the Petition. In support of this Motion, Respondent attaches an affidavit indicating the amount of attorney time spent preparing this motion and responding to Appellant's misstatement, and the hourly attorney rate.

Dated: August 22, 1997

Respectfully submitted,

Steven F. Olson, *Counsel of Record*
BlueDog, Olson & Small, P.L.L.P.
Southgate Office Plaza, Suite 5000
5001 West 80th Street
Minneapolis, MN 55437
(612) 893-1813
ATTORNEY FOR RESPONDENT

AFFIDAVIT OF STEVEN F. OLSON

I, Steven F. Olson, being first duly sworn, do hereby depose and state:

1. I am Respondent's Counsel of Record in the matter of *Cohen v. LSI*, on Petition for Writ of Certiorari to the Minnesota Supreme Court.

2. I have read and responded to the arguments made by Petitioner's counsel, Gregory A. Abbot, in the Petition for Writ of Certiorari.

3. It is my belief that the assertion of Petitioner's counsel that "[t]ribal sovereign immunity exists by virtue of Congressional action," Petition at 19, upon which the entire Petition is based, is blatantly false, intentionally misleading, and in violation of Rule 11 of the Federal Rules of Civil Procedure.

4. The attached table correctly states the hourly rate and the amount expended in response to the Petition and in making the attached Motion for Rule 11 Sanctions. The table is derived from contemporaneous time records, created by the attorneys involved and maintained by the Office Administrator of BlueDog, Olson & Small, P.L.L.P.

Dated: August 22, 1997

Steven F. Olson, *Counsel of Record*
BlueDog, Olson & Small, P.L.L.P.
Southgate Office Plaza, Suite 5000
5001 West 80th Street
Minneapolis, MN 55437
(612) 893-1813
ATTORNEY FOR RESPONDENT

County of Hennepin }
}ss.
State of Minnesota }

Subscribed to and sworn before me
this _____ day of August, 1997

_____
Notary Public

ATTORNEY	HOURS	RATE	AMOUNT
STEVEN F. OLSON	39.10	250.00	9775.00
VANYA HOGEN-KIND	.20	200.00	40.00
JACK BLAIR	46.60	150.00	6990.00
JANET ERICKSON	3.60	150.00	540.00
TOTALS:	89.50		$17345.00

ABBOTT & BARUCH, LTD. ATTORNEYS AT LAW

Gregory A. Abbott*

*ALSO ADMITTED IN TEXAS

www.abbottlaw.com
E-mail: greg@abbottlaw.com

2424 Centre Village
431 South Seventh Street
Minneapolis, Minnesota 55415
(612) 333-9158
FAX (612) 333-9147

Reply to
Minneapolis Office

Texas Office
3301 Century Drive, Suite D
Rowlett, Texas 75088
(972) 412-7192
FAX (972) 412-4028

AUGUST 21, 1997

Via regular U.S. mail and fax (893-0650)

Steven F. Olson
BLUEDOG, OLSON & SMALL
5001 West 80th Street
Minneapolis, Minnesota 55437

RE: ***Cohen v. Little Six, Inc., et al.***

Dear Mr. Olson:

I hereby decline the invitation contained in your letter of July 31, 1997, to withdraw or correct our Petition for Writ of Certiorari in the above-captioned case.

As a fair warning and professional courtesy, I have two points for you to consider prior to the filing of your Rule 11 Motion.

First, you yourself have incorrectly cited precedent to the Court. I refer to your assertion that " . . . *Adarand* [is] a split opinion with no majority reasoning . . ." at page 17 of your Brief in Opposition. This statement is false: Justice O'Connor was writing for the Court, with the agreement of five Justices. The fact that *Adarand* is a formal opinion of the Court is precisely what distinguishes it from *Bakke*, and makes it noteworthy.

Second, your Rule 11 Motion is based on the incorrect premise that our Petition is frivolous in its entirety because of our "false" arguments. However, we have exactly the same grounds to seek review as in *Gavle*, and we cite those independent grounds on pages 23 to 24 of our Petition. Even assuming your arguments are true (an assumption I most emphatically reject), the Petition itself is not frivilous because we have valid and independent grounds to seek review. I presume that no Rule 11 Motion has been filed against Craig Greenberg for his Petition in *Gavle*. Your Motion therefore grossly overstates both the alleged violation and costs incurred as a result of the alleged violation.

Please take notice that these points may form the basis for a Counter-Motion for Sanctions.

Sincerely,

Gregory A. Abbott

cc: Clinton C. Collins, Jr.

CERTIFICATE OF SERVICE

I, Christene L. Bazinet, certify that on August 22, 1997, I mailed via U.S. Mail, postage prepaid, a copy of this MOTION FOR RULE 11 SANCTIONS to the following:

Mr. Gregory Abbott
Abbott & Baruch, LTD.
2424 Centre Village
431 South Seventh Street
Minneapolis, MN 55415

Christene L. Bazinet

Supreme Court, U.S.
FILED
SEP 9 1997
CLERK

No. 96-1962

In the
Supreme Court of the United States
October Term, 1996

Sylvia Cohen,

Petitioner,

v.

Little Six, Inc., d/b/a Mystic Lake Casino,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

GREGORY ANDREW ABBOTT
Counsel of Record
ABBOTT AND BARUCH, LTD.
431 South Seventh Street, Suite 2424
Minneapolis, Minnesota 55415
(612) 333-9158

CLINTON COLLINS, JR.
CLINTON COLLINS &
ASSOCIATES, P.A.
821 Marquette Avenue, Suite 2500F
Minneapolis, Minnesota 55402
(612) 373-0991

Attorneys for Petitioner

1997 - Bachman Legal Printing ■ (612)339-9518 or 1-800-715-3582 ■ FAX (612)337-8053

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF REPLY 1

I. CONGRESSIONAL SANCTION AND/OR AUTHORIZATION OF TRIBAL ACTS CONSTITUTES STATE ACTION 1

II. THE HISTORIC ORIGIN OF TRIBAL SOVEREIGN IMMUNITY IS IRRELEVANT TO PETITIONER'S ARGUMENT 4

III. APPLICATION OF STRICT SCRUTINY WILL NOT REDUCE INDIAN TRIBES TO "PRIVATE, VOLUNTARY" ASSOCIATIONS 5

IV. PETITIONER'S LEGAL ISSUES WERE PROPERLY RAISED BELOW 7

V. CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Adarand Constructors Inc. vs. Pena, 515 U.S. 200 (1995) 6

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 3

Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977), *cert. den.*, 439 U.S. 820 (1977) 2

Holt v. C.I.R., 364 F.2d 38 (8th Cir. 1966) 3

International Longshoreman's A'ssn, AFL-CIO v. Davis, 476 U.S. 380 (1986) 8

Kansas v. Hendricks, ___ U.S. ___ (1997) 8

McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) 7

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 2

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 1, 3

Morton v. Mancari, 417 U.S. 535 (1974) 6, 9

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 3

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986) 7

Tischendorf v. Tischendorf, 321 N.W.2d 405 (Minn. 1982) 7

United States v. Williams, 504 U.S. 36 (1992) 8

Statutes

25 C.F.R. § 81.1 4

25 C.F.R. § 83.1 4

25 U.S.C. § 450(a)-(a)(1) 2-3

25 U.S.C. § 465 3

25 U.S.C. § 476, (a)-(e) 1, 4

Rules

Rule 103.04, MINN. R. CIV. APP. P. 7

SUMMARY OF REPLY

In its brief in opposition, Respondent obliquely raises an issue which itself justifies granting the writ of certiorari. That issue: the question of state action arising from Congressional regulation of the internal affairs of Indian tribes. If extensive Congressional involvement in Indian affairs constitutes state action, then the nature and extent of tribal sovereign immunity is subject to equal protection analysis. *Cf. Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 177-79 (1972) (regulation involving internal private rules was state action violating equal protection clause). As a consequence, Respondent's primary objection to granting the writ of certiorari -- the inherent origin of tribal sovereignty -- misses the point.

I. CONGRESSIONAL SANCTION AND/OR AUTHORIZATION OF TRIBAL ACTS CONSTITUTES STATE ACTION

The relevant question for equal protection purposes is whether Congressional involvement in tribal affairs constitutes state action, not whether Congress is the source of tribal sovereign immunity *per se*. Respondent's brief in opposition shoots wide of the mark by focusing exclusively on the origins of tribal sovereignty.

The flaw in Respondent's reasoning is apparent in the very language of its argument:

> Even if Petitioner were to argue that adopting a constitution under provisions of the Indian Reorganization Act, 25 U.S.C. § 476, constitutes federal action creating a race based preference, such argument could not pass muster. "While the exercise of powers under these constitutions was expressly sanctioned by Congress, the tribes adopting them

> continue to exercise their unextinguished powers of sovereignty and not statutorily delegated powers."

Brief in Opposition, at 14-15 n. 9 (emphasis added) (citation omitted). Respondent thus concedes that the exercise of these powers has been "expressly sanctioned by Congress." That express sanction constitutes state action subject to equal protection analysis, regardless whether such powers are characterized as inherent or delegated.

Congressional involvement in Indian tribal affairs is more than mere sanction. The purpose and effect of Congressional action is to restore Indian tribal self-determination, necessarily including their exercise of sovereign immunity. *See, e.g, Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973) (the intent and purpose of the Indian Reorganization Act of 1934 ("IRA") was to give Indian tribes the chance to restore initiative destroyed by a century of oppression and paternalism); *Cheyenne River Sioux Tribe v. Andrus,* 566 F.2d 1085, 1086 (8th Cir.), *cert. den.*, 439 U.S. 820 (1977) (Purpose of the IRA is to encourage Indians to revitalize their self-government).

Congress has explicitly acknowledged that federal action is necessary prerequisite to tribal self-determination. In 1975, Congress enacted a statute which included the following formal finding of fact:

> The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that ---
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full

> opportunity to develop leadership skills crucial to the realization of self-government . . .

25 U.S.C. § 450(a) and (a)(1) (the Indian Self-Determination and Education Assistance Act) (emphasis added). In other words, Congress determined that Indian tribes require federal assistance in order to realize true self-government, because "prolonged Federal domination" of Indian tribes has prevented its exercise.

Under analogous circumstances, this Court has found the presence of state action. In *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 724-725 (1961), the Court held state action existed because the government leased public property to a private business which engaged in discriminatory activity. *Burton* applies with particular force to the present case: state action is present because title to all Indian lands is held in the name of the United States. *See* 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to . . . this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired . . . "); *see also, e.g., Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667 (1974) (". . . fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States . . ."); *Holt v. C.I.R.,* 364 F.2d 38, 41 (8th Cir. 1966) (Indian tribal land is held in trust by the United States for the use of the tribe).

This Court's decision in *Moose Lodge No. 107 v. Irvis, supra,* under similar facts, also demonstrates the existence of state action. *Moose Lodge* held generally that government regulation of private conduct in and of itself does not rise to state action. *Id.,* 407 U.S. at 176-77. However, state action is present when regulations require the private actor to follow its discriminatory internal rules and by-laws. *Id.,* at 178-79. Likewise, the tribal exercise of sovereign immunity necessarily

involves state action, given the breadth and depth of Federal involvement in internal tribal affairs. Congress significantly regulates both the procedures for adopting tribal constitutions as well as their content. *See* 25 U.S.C. § 476(a)-(e); 25 C.F.R. § 81.1, *et seq.* (extensive procedural and substantive requirements for adoption of tribal constitutions and bylaws). Federal involvement extends to the *a priori* question of a tribe's very existence: the Federal government will not recognize an Indian tribe unless it complies with a complex set of regulations. *See* 25 C.F.R. § 83.1, *et seq.*

As part of a statutory scheme designed to promote Indian self-determination, Congress has sanctioned and authorized racially discriminatory acts. Such action by Congress constitutes state action, and should be reviewed by this Court.

II. THE HISTORIC ORIGIN OF TRIBAL SOVEREIGN IMMUNITY IS IRRELEVANT TO PETITIONER'S ARGUMENT

Respondent's vigorous defense of the extra-Congressional origins of tribal sovereignty is beside the point: it is the Congressional decision to restrict tribal sovereign immunity in some areas while permitting in others which is subject to equal protection analysis, and not the tribes' exercise of sovereign immunity *per se.* Thus solely for purposes of equal protection analysis tribal sovereign immunity exists "by virtue" of congressional action.

Title 25 of the United States Code, and regulations promulgated thereunder, discussed above, undermine Respondent's argument. Respondent presumes Congress has used its plenary power over Indian tribes *a la carté* -- enacting limitations on tribal sovereignty here and there, with no overall goal or purpose. However, the quantity and specificity of the statutes and regulations governing Indian affairs demonstrate that tribal powers, while perhaps not delegated as such by

Congress, exist because of an affirmative Congressional choice implementing a comprehensive statutory scheme.

Congress cannot exercise its plenary power to occupy the field of Indian affairs in a manner which discriminates on the basis of race, even if the discriminatory acts do not flow from Congressional action. The following hypothetical may illustrate the point. Suppose that certain non-governmental actors were engaging in acts amounting to racial discrimination under the "color of law." In response, Congress enacted a statute, pursuant to its power to enforce the Fourteenth Amendment, prohibiting those acts, but that this hypothetical statute applied, by racially explicit terms, only to discrimination against African-Americans. In this hypothetical situation, strict scrutiny equal protection analysis would apply because Congress used racial classifications in the exercise of its plenary power to enforce the Fourteenth Amendment, extending legal protections to African-Americans unavailable to members of any other race. The fact that Congress was not the legal source for discriminatory acts "under color of law" is irrelevant to the equal protection analysis.

Likewise Respondent's focus on the inherent nature of tribal sovereign immunity is a red herring: the proper question is whether Congress, in the exercise of its plenary authority over Indian affairs, has adopted, authorized, or sanctioned racial discrimination by Indian tribes. This important question, wholly ignored by Respondent, alone justifies granting the writ of certiorari.

III. APPLICATION OF STRICT SCRUTINY WILL NOT REDUCE INDIAN TRIBES TO "PRIVATE, VOLUNTARY" ASSOCIATIONS.

Adarand's admonition that application of strict scrutiny should not automatically invalidate a challenged federal action

may apply with particular force to Indian tribes -- the constitutional status of Congress' plenary power over Indian affairs may well, for the sake of argument, reflect a compelling governmental purpose. *Adarand Constructors, Inc. vs. Pena*, 515 U.S. 200, 237 (1995) ("Finally we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). This alone eliminates a primary argument used in *Mancari* to avoid application of a higher level of scrutiny: Title 25 of the U.S. Code would not be struck down in its entirety. *See Morton v. Mancari*, 417 U.S. 535, 552-553 (1974) ("If these laws...were deemed invidious racial discrimination, an entire title of the United States Code (25 U.S.C.) would be effectively erased...").

But a compelling governmental purpose is only half of the constitutional equation: it remains to be seen whether Congressional action is narrowly tailored to serve that compelling interest. There may be situations in which the exercise of tribal sovereign immunity might, in fact, be so narrowly tailored. However, use of tribal sovereign immunity to defend an immensely profitable casino is certainly not such a case.

In any event, it is a poor "slippery slope" argument to assert that "Petitioner seeks to have this Court treat Indian tribes as little more than private voluntary organizations." Brief in Opposition at 8. Respondent confuses sovereignty with sovereign immunity, and compounds the error by ignoring the commercial, not governmental, use of sovereign immunity in this case. This Court is quite capable of drawing legal distinctions necessary to avoid Respondent's parade of horribles.

IV. PETITIONER'S LEGAL ISSUES WERE PROPERLY RAISED BELOW

As a matter of state law the Minnesota Supreme Court has rejected Respondent's claim that the issues were not properly raised below. After Petitioner filed her Petition for Review in the Minnesota Supreme Court, Respondent filed a Motion to Strike, contending that the constitutional claims had not properly been raised previously. Respondent's Motion to Strike at 1-2. The Minnesota Supreme Court denied Respondent's Motion without comment, and granted the Petition for Review without any condition or limitation on the issues to be raised. Order Granting Review, April 12, 1996.

Minnesota law contains an unusually broad grant of appellate jurisdiction, providing ample justification for the conclusion that the Petitioner's issues were properly raised below. Minnesota appellate courts possess the inherent power to analyze any matter on appeal "as the interest of justice may require." Rule 103.04, MINN. R. CIV. APP. P. *See also McCormack v. Hankscraft Co.*, 278 Minn. 322, 154 N.W.2d 488, 502-03 (1967) ("[W]e may, in our discretion, 'review any other matter as the interests of justice require.'"). The Minnesota Supreme Court has the power to review important constitutional issues despite procedural defects, including the power to consider constitutional claims for the first time.[1]

This Court does not have the power to review a decision by a Minnesota court exercising its appellate jurisdiction under

---

[1] *See Specialized Tours, Inc. v. Hagen,* 392 N.W.2d 520, 536 n.15 (Minn. 1986) ("the constitutional issue was briefed by both parties and is an issue of public importance. We have taken jurisdiction despite procedural flaws when we consider an issue of public importance."); *Tischendorf v. Tischendorf,* 321 N.W.2d 405, 410 (Minn. 1982), *cert. den.*, 460 U.S. 1037 (1983) (constitutional issues may be raised for the first time on appeal in Minnesota courts when failure to review the issue may work an injustice or infringe upon a constitutional right).

Minnesota law. If a state court of last resort has already ruled the issues were properly raised, then this Court cannot review such a decision if it is based on an adequate and independent state ground. *See, e.g., International Longshoreman's A'ssn, AFL-CIO v. Davis,* 476 U.S. 380, 387 (1986) (" . . . we have no authority to review state determinations of purely state law."). Although the order of the Minnesota Supreme Court does not establish the grounds of the decision, the arguments and briefs of the parties on the issue were overwhelmingly based on Minnesota law, creating a strong presumption that the decision was based on Minnesota law. *See* Motion to Strike (citing Minnesota law); Petitioner's Response to Motion to Strike (citing Minnesota law).

The fact that the Minnesota Supreme Court did not pass upon Petitioner's constitutional arguments does not bar consideration in this Court, because they were pressed, albeit unsuccessfully. This Court has held:

> Our traditional rule . . . precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." . . . That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions.

United States v. Williams, 504 U.S. 36, 41 (1992) (emphasis added, citations omitted). This Court has previously addressed fundamental constitutional issues ignored by a state court of last resort. *See, e.g., Kansas v. Hendricks,* ___ U.S. ___ (1997) (slip opinion at 8) (considering constitutional

issues pressed by petitioner, but not passed upon by the Kansas Supreme Court).[2]

The deliberate decision of the Minnesota Supreme Court to accept review of all issues raised by Petitioner, combined with its failure to decide all such issues, while anomalous, is no bar to this Court's consideration.

V. CONCLUSION

The present case squarely presents a contradiction in constitutional principle: while the Constitution forbids the government from acting on the basis of racial classifications (except in the most compelling and narrow circumstances), it grants Congress plenary power to regulate the affairs of a specific group of persons, defined explicitly on the basis of their race. This contradiction cuts to the heart of the phrase "equal protection of the laws" and deserves thorough consideration by this Court.

---

[2] This rule also allows consideration of issues raised by the remarkable dissenting opinion of Judge R.A. Randall, in the Minnesota Court of Appeals. Judge Randall pressed a broad range of issues in his dissent, including racial discrimination and equal protection, which the majority in the Minnesota Court of Appeals did not pass upon. *See, e.g.*, Appendix to Petition for Writ of Certiorari, at A-62 to A-63 (Randall, J., dissenting) (explicitly rejecting *Morton v. Mancari*, 417 U.S. 535 (1974)).

SEPTEMBER 8, 1997 Respectfully Submitted,

GREGORY ANDREW ABBOTT
Counsel of Record
Abbott & Baruch, Ltd.
431 South Seventh Street, Suite 2424
Minneapolis, Minnesota 55415
(612) 333-9158

CLINTON COLLINS, JR.
Clinton Collins & Associates, P.A.
821 Marquette Avenue, Suite 2500 F
Minneapolis, Minnesota 55402
(612) 904-0784

Attorneys for Petitioner